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ON THE “POVERTY OF RESPONSIBILITY”:  
A STUDY OF THE HISTORY OF CHILD PROTECTION LAW AND  
JURISPRUDENCE IN NOVA SCOTIA

by

Ilana Dodi Luther

Submitted in partial fulfilment of the requirement  
of the degree of Doctor of Philosophy

at

Dalhousie University  
Halifax, Nova Scotia  
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## DEDICATION PAGE

To my husband.

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## ABSTRACT

This thesis presents a history of child protection law and jurisprudence in Nova Scotia. The thesis begins by examining the development of the first child protection statute in Canada, the Nova Scotia *Prevention and Punishment of Wrongs to Children Act* in 1882. The Act was developed amidst a climate of reform in late-19<sup>th</sup> century Halifax, at the urging of the Society for the Prevention of Cruelty to Animals. The Act, along with a number of other pieces of “domestic relations” legislation at the time, was focused on protecting children in poverty. With the passing of the Act, the legislature not only set out the harms to children that would justify an intrusive intervention into the family, but it affirmed the presumption of family autonomy in a liberal society. In this thesis, I detail how, through history, the defining, adjudicating and remedying of harm to children through child protection law and jurisprudence has helped to construct the division between the public sphere and the private sphere of the family in poverty. I explore how the divide has shifted over time, responding to new ideas from welfare professionals about harm to children and their best interests, as well as social policies setting out the proper relationship between the family and the state. I show how, despite the fact that knowledge of what constitutes harm to children has shifted significantly over time, families marginalized at the intersection of poverty, racism, sexism and ableism have always been more likely to be constructed as “dissolute”, “unfit” or “risky”, justifying a coercive intervention into the family and the denial of state support. Without subjecting concepts of harm and best interests to critical analysis, child protection law and jurisprudence will continue to perpetuate the same processes of subordination based on race, class, gender and ability that render the child vulnerable in the first place. I conclude with recommendations for a supportive legal concept of family autonomy for socio-economically marginalized families.

## **ACKNOWLEDGEMENTS**

I would like to very gratefully acknowledge the contribution of my committee members, Dr. Alexandra Dobrowolsky and Prof. Sheila Wildeman, who have both provided me with their incredible insight, guidance, and patience over the past six years. I would especially like to thank my extremely patient, giving, and knowledgeable supervisor, D.A. Rollie Thompson, QC. For anyone who has had the privilege of working with Prof. Thompson you know that he is a wonderful teacher, scholar and mentor. I feel incredibly privileged to have been able to take up so much of his time. I also feel very privileged and grateful to have had such a wonderful external examiner. Prof. Susan B. Boyd's work had a significant impact on this thesis from the beginning, and to meet her at the end of this journey and get her feedback was an incredible gift. Of course to my parents, Michael and Maureen Luther, to whom I "chalk" up my love of learning, and thank immensely for facilitating a passion which admittedly has gone on for probably too long. I thank my loving grandmother, Agnes Freeman, former nurse, welfare caseworker, and current mentor. And especially my husband, Piotr Stanisław Łuczak, who is just all around super great and understanding.

## **Chapter 1: Introduction:**

### **On the “Poverty of Responsibility”:<sup>1</sup> A History of Family Law for the Poor**

This thesis is about families in poverty. It is about how law has helped to construct the family in such a way as to address this poverty. This might seem counter-intuitive as we generally understand the state and government – ie., the public sphere – as having responsibility for the social welfare programs that help people in poverty. The family, by contrast, is a sphere of private, domestic relations, which has little or nothing to do with the work of government or helping the poor. We generally understand families as natural, organically formed kinship groups which are outside the concerns of politics or government.

In this thesis, however, I will show that through history, the “natural” family has shifted form in response to larger social and economic goals. Early women’s rights movements, especially, had a profound impact at the end of the 19<sup>th</sup> century on the family form in Canada. Wives were given the right to hold and dispose of property and the right to make a will.<sup>2</sup> They were given the right to own businesses and make wages in their own names.<sup>3</sup> They were given the right to apply for alimony,<sup>4</sup> and for maintenance and custody of their legitimate children.<sup>5</sup> The legal concept of the family began to be seen not just as a

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<sup>1</sup> *Nova Scotia (Minister of Community Services) v JGB*, [2002] NSJ No 295; re: a mother’s unwillingness to keep her house clean.

<sup>2</sup> *Of the Property of Married Women*, RSNS 1884 (5<sup>th</sup> Ser) c 94.

<sup>3</sup> *Married Women’s Property Act*, SNS 1893, c 11, s 1.

<sup>4</sup> *Court for Divorce Act*, SNS 1866, c 13.

<sup>5</sup> *An Act Respecting the Custody of Infants*, SNS 1893, c 11.



patriarchal fiefdom free from the intruding eye of the courts, but as a group of increasingly equal individuals in the eyes of the law. And it was not just women who came to be seen as individuals before the law. Children began to be seen as individuals with their own needs and interests as opposed to the chattels of their fathers. Fathers were positioned as trustees in relation to their children as opposed to property owners, and custody decisions were made on the basis of the welfare of the child.<sup>6</sup>

This traditional story of family law reform at the end of the 19<sup>th</sup> century is for the most part, a success story for women and children. However, I will show that the traditional view of family law reform at the end of the 19<sup>th</sup> century as one of liberalization and formal equality between its members fails to reveal the differential impact that law reform had on the poor. Propertied families – that is, families that could support themselves either with real or personal property, and/or with wages – were accorded a system of family law that families who required outside assistance were not. Propertied families were provided access to the superior courts which, unlike the lower stipendiary courts to which the poor were often subject, could actually protect and enforce rights to property, divorce, alimony and custody.

Both legal scholars and sociologists have long posited the differing nature of legal intervention into the family depending on social class. American legal historian Jacobus tenBroek set out how families were subject to differing legal regimes according to where one stood in relation to property and class. He called this the “dual system of family law” – one system for the poor and one system for everyone else.<sup>7</sup> TenBroek’s work analyzed California’s system of family law in the mid-1960s, arguing that these two systems of family

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<sup>6</sup> *Ibid.*

<sup>7</sup> Jacobus tenBroek, “California’s Dual System of Family Law: Its Origin, Development, and Present Status: Part II” (1964) 16 Stan LR 900.

law were distinct in form and content. One of his contemporaries provided the following summary of his work:

The result of this dual system of law, according to Professor tenBroek, appears to be a separating wall in regard to almost any matter of concern for the family -- possession of property; support relations between husband, wife, and children; creation and dissolution of the family; custody of children; rights and duties of parents; and so on. In regard to the poor there appears to be less emphasis on rights, and fitness as a parent or even as a useful citizen is rarely presumed. The burden of proof is cast on the poor person, whatever the issue may be, to make a case in his favor. He is often subjected to official investigations, not infrequently to humiliation and harassment. His plight is subject to exploitation for political purposes, for instance, during elections, because of the public concern for the spending and possible waste of tax moneys. The law of the poor appears to be largely a creation of the legislature and, by way of implementation, of the executive. Regulations of government agencies play an important role, as do actual practices of welfare workers and police which are often characterized by low visibility.

The family law of the more fortunate, following Professor tenBroek's reasoning, is largely created and administered by the courts. The law changes slowly here because of the conservative orientation of many judges, who are vested with substantial discretion. Marriage is viewed as similar to a partnership between semi-independent parties, resulting in a network of legal relations often proprietary in nature. The legislature appears to be basically uninterested. By contrast, the law of the poor is affected by continued tampering by the legislature and by pressure groups. It is a matter of persistent concern. Husband and wife are viewed as an integrated entity, having pooled resources for purposes of minimizing public aid. Fiscal considerations are dominant and frequently enforced by conditions attached to welfare aid, designed to keep the costs of welfare programs low. The police power of the state appears to be used to secure the comfort and the wealth of those who are more fortunate against those who are in need and lack the time, power, and resources to pursue their legitimate aims.<sup>8</sup>

Family law for the poor was replete with fiscal and political considerations and as tenBroek argued, was designed to keep the costs of welfare programs low.<sup>9</sup> While the individual members of propertied families were accorded liberal rights and protections and access to the court to enforce these rights and protections, the family in poverty in contrast, has been “long regarded as a site of social dysfunction and source of social

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<sup>8</sup> Walter O Weyrauch, “Dual Systems of Family Law: A Comment” 54.2 (May 1966) Cal LR 781 at 782-83.

<sup>9</sup> *Ibid.*

problems, has been both hyper-regulated and surveilled, and ignored and under-supported.”<sup>10</sup> While members of propertied families were increasingly given the legal means to self-determine, the same cannot be said of members of families in poverty. In Nova Scotia, while legislation was passed at the end of the 19<sup>th</sup> century liberalizing the rights of persons in propertied families, families in poverty found themselves subject to a punitive regime of “domestic relations”<sup>11</sup> of which the first child protection act in Canada, the *Prevention and Punishment of Wrongs to Children Act*,<sup>12</sup> was but one part.

But legal regulation of the family in poverty is only part of the story. The full significance of family law reform at the end of the 19<sup>th</sup> century is only understandable when we track how family law reform was part of an overall change in the way that liberal societies were governed at the end of the 19<sup>th</sup> century. In his book, *The Policing of Families*, Jacques Donzelot tracked how the family and family law reform played a key role in the

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<sup>10</sup> Shelley AM Gavigan, “Something Old, Something New? Re-Theorizing Patriarchal Relations and Privatization from the Outskirts of Family Law” (2012) 13 *Theoretical Inq L* 271 at 283.

<sup>11</sup> Most of these Acts appeared in a mere seven-year time period at the end of the 19<sup>th</sup> century under Title XVII “Of Domestic Relations”, RSNS 1900, c 111 to c 126:

*Of the Solemnization of Marriage;*  
*Of the Property of Married Women;*  
*Of Conveyances of Real Property by Married Women;*  
*Of Dower;*  
*Of Guardians and Wards;*  
*Of the Prevention and Punishment of Wrongs to Children;*  
*Of Apprenticeships;*  
*Of the Transfer of Immigrant and Orphaned Children;*  
*Of the Prevention of the Use of Tobacco and Opium by Minors;*  
*Of the Maintenance and Reform of Juvenile Offenders;*  
*Of the Custody of Infants;*  
*Of the Adoption of Children;*  
*Of the Licensing of Boarding houses for Infants Under Twelve Years of Age;*  
*Of the Closing of Shops and the Hours of Labour therein for Children and Young Persons;*  
*Of the Custody and Estates of Lunatics;*  
*Of the Guardianship and Care of Inebriates.*

<sup>12</sup> SNS 1882, c 18.

rise of the “social sector” in the late eighteenth and early 19<sup>th</sup> century.<sup>13</sup> The “social sector” arose as a field distinguishable from the economic, political, or the judicial fields, that developed institutions and actors that would work upon certain social problems: alcoholism, delinquency, feeble-mindedness, etc.

Donzelot wrote that the development of these technologies of the social sector changed the method of liberal government from governing the family, to governing *through* the family. With the emergence of the social sector we see the conduct of individuals governed – with the use of non-state actors such as philanthropists and medical and legal professionals – using the ostensibly private sphere of the family.<sup>14</sup> Therefore, Donzelot argued that the family and its regulation became a solution to the problems posed by the liberal state.<sup>15</sup> So while the Industrial Revolution at the turn of the 19<sup>th</sup> century exacerbated social inequality thereby threatening the liberal state, the family was transformed in order to respond to these threats.<sup>16</sup> Donzelot wrote:

The placing of the family outside the sociopolitical field, and the possibility of anchoring mechanisms of social integration in the family, are not the result of a chance meeting between the capitalist imperative of maintaining private property and a structure dedicated to producing subjection by means of the Oedipus complex or what have you, but the strategic outcome of a series of interventions that wield family authority more than they rest on it. In this sense, the modern family is not so much an institution as a *mechanism*. It is through the disparity of the familial configurations (the working-class and bourgeois bipolarity), the variances between individual interests and family interest that this mechanism operates.<sup>17</sup>

The family was an important site for first, the philanthropic work and later, for the social work that was so integral to preserving order in society while maintaining the liberal

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<sup>13</sup> Jacques Donzelot, *The Policing of Families* (New York: Pantheon Books, 1979).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid* at 53.

<sup>16</sup> *Ibid* at 54.

<sup>17</sup> *Ibid* at 83.

illusion of the public/private divide. Philanthropy and social work would work upon the family first in the charitable, religious, moralizing discourse, and then in a normalizing, medical-hygiene discourse, all the while maintaining the consistency of the liberal belief in the autonomy of the family and the individual. Philanthropy and social work promised greater autonomy, both of the family, and within the family. The social sphere responded to the growing unrest and dysfunction confronted by the Victorian patriarchal family and used the promise of both renewed autonomy for the family as a whole, and of greater autonomy of women and children within the patriarchal family in particular, to maintain social order. Autonomy for bourgeois families meant the government of protected liberation for children, and arguably for women, as well. However, this promise of autonomy was not provided equally for the poor.

Donzelot argued that the figure of the child and “technologies of pedagogy and child rearing” became a central method in the rise of the social sector. However, he wrote that the way the social sector worked upon the families of the poor and the families of the middle and upper classes were quite different:

What of childhood? In the first instance, the solicitude of which it was the object took the form of a *protected liberation*, a freeing of children from vulgar fears and constraints. The bourgeois family drew a sanitary cordon around the child which delimited his sphere of development: inside the perimeter the growth of his body and mind would be encouraged by listing all the contributions of psychopedagogy in its service, and controlled by means of a discreet observation. In the second instance, it would be more exact to define the pedagogical model as that of *supervised freedom*. The problem in regard to the working-class child was not so much the weight of obsolescent constraints as excessive freedom –being left on the street – and the techniques employed consisted in limiting this freedom, in shepherding the child back to spaces where he could be more closely watched: the school or the family dwelling.<sup>18</sup>

The juvenile delinquent regime – an early child protection regime – and the development of the juvenile court was a way for the social sector to regulate the problem

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<sup>18</sup> *Ibid* at 47.

of the juvenile delinquent and in particular the children of poor and working class families.<sup>19</sup> The development of the child protection system at the end of the 19<sup>th</sup> century, Donzelot argued, was a way to threaten family privacy with the loss of parental authority for “morally deficient” families.<sup>20</sup> While the child protection system then served to promote the notion of the autonomy of morally upright families (ie. bourgeois or white, Christian working-class families), it did not want to become a dumping ground for working-class families to abandon the children they could not care for. The child protection regime became a means to judge the minor delinquent, but maintain the minor within the home while ensuring surveillance of the family. Rather than continuing to simply institutionalize delinquent and neglected children, protective societies emerged that would, after the child was brought before the judicial system, take the children under their wing and return them to their families.<sup>21</sup> The protective societies would then assist the children to stay in the home while still extending visiting, assistance and surveillance over the family.

The child protection system, according to Donzelot, became an important mechanism for liberal government in governing families in poverty, connecting the family to larger social objectives. It helped to address the social problems of the time, utilizing a discourse of “freedom”, while at the same time responding to demands to keep poor families from becoming too heavy a burden on the public purse. But an examination of the techniques and practices of the child protection system reveals the differential method of liberal government for families in poverty. It helps to reveal how the concept of the family as a “private sphere” is constructed differently for families in poverty.

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<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid* at 83.

<sup>21</sup> *Ibid* at 85.

## **Child Protection Law and Families in Poverty**

The first child protection law in Nova Scotia and indeed, in Canada as a whole, the *Prevention and Punishment of Wrongs to Children Act* was passed in 1882 at the urging of the Society for the Prevention of Cruelty to Animals in Halifax (the “Society”). The Act was written in criminal law terms, setting out investigative powers of the police, justices of the peace and constables to investigate wrongs to children.<sup>22</sup> On finding that a person had committed a wrong under the Act, the stipendiary magistrate was then able to make a number of orders including imposing fines on the perpetrators of wrongs to children.<sup>23</sup> But the magistrate could also remove children from parents if the magistrate thought it was in the child’s welfare.<sup>24</sup> The Act was part of an overall change in the way that children were thought of in society and the way that society thought that children should be treated. The well-being of children was increasingly understood by law and society as deserving of protection. Childhood was conceptualized by the Victorians as a sphere of innocence and children were to be kept off of the streets, out of factories, saloons and places of entertainment.<sup>25</sup> Family law reform at the end of the 19<sup>th</sup> century saw the positioning of

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<sup>22</sup> Section 2.

<sup>23</sup> Section 3.

<sup>24</sup> Section 3.

<sup>25</sup> Section 1 provided:

No minor under the age of sixteen years shall be admitted at any time to, or permitted to remain in, any saloon or place of entertainment where any spirituous liquors or wines or intoxicating or malt liquors are sold, exchanged, or given away, or in any of the places of amusement known as dance houses, billiard rooms, cippi rooms, dancing classes, clubs or concert saloons, unless accompanied by his or her parent or guardian; nor into any bawdy house or house of ill-fame under any circumstances whatsoever. ...

Neil Sutherland, *Children in English-Canadian Society: Framing the Twentieth Century Consensus* (Ontario: Wilfred Laurier University Press, 2000).

parents in poor families as well as in propertied families, as trustees in respect of their children as opposed to mere property owners.

But there was one class of child that was at the center of concern in the development and enforcement of the *Prevention and Punishment of Wrongs to Children Act*: the child in poverty.<sup>26</sup> The wrongs that characterized cruelty to children were not just physical harms, but the way these harms were articulated in the Act captured anxieties about the activity of the poor. Philanthropists and criminal law personnel were most influential in setting out the wrongs that would justify an intervention into the private sphere of the family and the removal of the child from the custody of the parent. Their legacy is noticeable in the way the wrongs were articulated in the Act:

Whenever the parent or other person having the care and custody of a child [under the age of sixteen years], is convicted before any court or magistrate with having assaulted, beaten, ill-used, abandoned or treated said child with habitual cruelty and neglect, or said child is suffered to grow up without salutary parental control, or in circumstances exposing him or her to lead an idle or dissolute life and the court or magistrate before whom such suspicion is had, deems it desirable for the welfare of the child.<sup>27</sup>

The Act was written in criminal law language, thereby criminalizing activity which had been regulated by the common law as private activity under the purview of the father: the care and upbringing of children.<sup>28</sup> Furthermore, the Act connected the care of the child to wider poor law and philanthropic reforms of the time. If the judge determined that it was in the welfare of the child, he could either institutionalize the child in an orphan asylum or charitable or other institution, “or make such other disposition thereof as now is or hereafter may be provided by law in cases of vagrant, truant, disorderly, pauper or

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<sup>26</sup> See, for example, Joy Parr, *Labouring Children: British Immigrant Apprentices to Canada, 1869-1924* (Toronto: University of Toronto Press, 1994).

<sup>27</sup> Section 3.

<sup>28</sup> Sir William Blackstone, *Commentaries on the Laws of England*, Book 1, chapter 16.



destitute children.”<sup>29</sup> The Act also applied to third parties. Minors under the age of 16 were not to be admitted to any “saloon or place of entertainment where any spirituous liquors or wines or intoxicating or malt liquors are sold” or “any of the places of amusement known as dance houses, clubs, or concert saloons” nor into “any bawdy house of ill fame”.<sup>30</sup> A proprietor, keeper or manager who was found guilty of admitting a minor or allowed a minor to remain on the premises could be found guilty of an offence and liable to pay a fine, failing which, the offender would be committed to a common gaol.<sup>31</sup>

As I discuss in the next chapter, the Act and the philanthropists at the Society who enforced the Act no doubt did much to improve the condition of some children in poverty in Halifax at the end of the 19th century. But their work was addressing two problems simultaneously: the problem of protecting the child from certain harms and the problem of intervening in families in poverty. The result of the activity of child protection, or child saving as it was known,<sup>32</sup> was therefore not simply to prevent and punish wrongs to children, but to simultaneously set out the boundaries of the private sphere of the family in poverty and the means by which these boundaries could be traversed. As child protection expert Robert Mnookin has said, “Defining the proper scope for ‘child protection’ poses fundamental questions concerning political and moral philosophy about the proper allocation of power and responsibility between the family and the state.”<sup>33</sup>

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<sup>29</sup> *Ibid.*

<sup>30</sup> Section 1.

<sup>31</sup> Sections 5 and 6.

<sup>32</sup> Anthony M Platt, *The Child Savers: The Invention of Delinquency* (Chicago: University of Chicago Press, 1977).

<sup>33</sup> Robert Mnookin, “Child Custody Revisited” (2014) 77 *Law and Cont Prob* 249 at 253.

The proper scope for child protection, however, has not remained static. Since the introduction of the first child protection act in Nova Scotia we have seen the figure of the child to be protected by the system shift over time. In the very early years of the Society, the work of protecting children was focused on parents and criminalizing wrongs to the child. Neglect by drunken fathers, and idle and dissolute mothers was the focus of much activity of child saving at this time.<sup>34</sup> However, the focus of child protection work soon shifted in the early 20<sup>th</sup> century with the development of the juvenile delinquent system. By the late-1910s, 1920s in Nova Scotia, the child at the center of protection work was the juvenile delinquent; constructed variously as an innocent and a potential social pariah.<sup>35</sup> In this era, the “truant” became a focus of the child protection work in Nova Scotia, and Halifax in particular.<sup>36</sup>

While truancy was the most commonly cited harm, or offence, committed by the juvenile delinquent for which state intervention was justified in the juvenile delinquent era, in reality there was little need to “charge” the child or the family with having committed a wrong at all. In Chapter 3 I will show that in the era of the juvenile delinquent regime, the harm committed was of less importance than the best interests of the child. Once a child came to the attention of the juvenile delinquent regime, there was little due process of law required in order to find the child situated in a reformatory or

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<sup>34</sup> See, for example, *Re Mahoney*, (1892) 24 NSR 86.

<sup>35</sup> Platt, *supra* note 32.

<sup>36</sup> Nova Scotia, House of Assembly, Office of the Superintendent of Neglected and Dependent Children, “Sixth Annual Report” in *Journals of the House of Assembly*, Appendix No 28 (1919) at 11. In 1919, for example, the following breakdown was presented for offences by juvenile delinquents and neglected children: Truancy (76); Theft (44); Breaking and Entering and theft (22); Damaging property (32); Violation of civic ordinances (11); contributing to delinquency (32); contributing to neglect (2); assault (9); vagrancy (5); violation of the Temperance Act (4); manslaughter (1). Truancy, therefore, comprised 37% of all cases of delinquency involving children. There were 225 boys before the court that year and 13 girls. The bulk of the boys were between the ages of 11-14 (ie., 125).

denominational institution. In this era there was little concern for the family, or individual, privacy of the poor. Instead, the professional psychiatrists and denominational personnel that populated the institutions to which juvenile delinquents were sent were highly influential in setting out the content of the best interests of the child. In this era of socializing justice, medical and psychiatric expertise were prized over legal expertise. As a result, the liberty interests of children and their families swiftly gave way to religious and medicalized interventions conducted in the name of the welfare of the child. Children of socio-economically marginalized families were institutionalized in this era with little due process, in order to reform them into upstanding and productive citizens modelled on a white, middle class, able-bodied ideal of the child.

Yet again, however, the figure of the child as delinquent at the center of child protection work shifted in the years after World War II. In these post-war years there was a focus not on the child as innocent or blameworthy, but on the child as a developing personality. The child was not born innocent or sinful, but rather was a product of their environment and in particular the psychological bonds and influences of familial relationships. Child protection work therefore shifted its focus in the post-war years onto the source of these bonds and influences: the family and in particular, the mother.<sup>37</sup>

In the war and post-war years much child welfare work was focused on working not only to protect children from physical harm and neglect, but on working with the unwed mother. While child development knowledge in the post-war years was espousing the value of maternal attachment, attachment to the unwed mother was not considered to be in the best interests of the child. The unwed mother was constructed by child development knowledge as “delinquent” and “neurotic” and incapable of providing for the

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<sup>37</sup> See, for example, John Bowlby, *Maternal Care and Mental Health* (Geneva: World Health Organization, 1952).

proper psychological development of the child.<sup>38</sup> In Chapter 4 I will show how, in the post-war years until the 1960s in Nova Scotia, unwed mothers were actively encouraged by child protection authorities to give up their children as a result.

Therefore, through history we can see that the harms and determinations of best interests that have served to justify outside intervention into the private sphere of the family have not been predicated solely upon safeguarding the physical well-being of children. Throughout the history of child protection law, various agents external to the family – whether criminal law, philanthropic, religious, medical or psychiatric – have had a hand in determining the content of the legal concept of harm to children and therefore, justifying legal interventions into the private sphere of the family. In the process of determining what constitutes harm to children and their best interests, these agents have informed constructions about what types of mothers and children are targeted by child protection interventions and why.<sup>39</sup>

In this thesis I will critically examine the shifts in focus of child protection law, from the era of cruelty to children, to the establishment of the juvenile delinquent regime, to the focus on unwed mothers in the post-war years, in order to understand how the family in poverty has been regulated by child protection law in a liberal society. In undertaking a critical historical analysis of child protection law, I begin from an understanding of law that is distinct from a “liberal legalist” approach. Liberal rule of law thinking exhorts us to believe that law’s categories are politically neutral: applying equally to all. Rather than seeing law as a neutral arbiter of disputes, as depicted by a liberal understanding of law, I

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<sup>38</sup> *Ibid* at 94-95.

<sup>39</sup> Karen Swift, *Manufacturing “Bad Mothers” A Critical Perspective on Child Neglect* (Toronto: University of Toronto Press, 1995); Marlee Kline, “Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women” in Martha Albertson Fineman and Isabel Karpin, eds, *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (New York: Columbia University Press, 1995).

understand law as a constitutive part of social life, capable not just of ordering our relationships – with each other or with the state – but of actively shaping individuals, relationships, and society in particular ways.<sup>40</sup> Furthermore, in mediating relationships – between the market, family, state, and individuals – the law is actively structuring relationships in ways that may perpetuate or challenge overarching processes of power.<sup>41</sup> In undertaking a critical historical analysis of child protection law I will examine how law has played a part in constructing mothers and children in poverty in ways that either reinforcing or challenging overarching relations of power affecting marginalized families.

For example, as I discuss in the next chapter, with the passing of child protection legislation in the late 19<sup>th</sup> century the conduct within the poor family received a new level of scrutiny. While the *Poor Law* provided that a father on poor relief lost the ability to direct the care and custody of his child, child protection legislation added a new contingency on which the family autonomy of the poor was based. The Act provided that a father's right to custody and care of his child was contingent not just on his ability to financially support his child, or protect the child from physical harm, but he had to ensure that his care of the child was not "exposing the child to a dissolute lifestyle". Industrialization, "intemperance", outmigration and desertion, however, meant that by the end of the 19<sup>th</sup> century many families in poverty would have, functionally or otherwise, been mother-headed families. The Act, then, served to legislate the content of the tenuous *de facto* right of mother-headed households at the end of the century to the care and

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<sup>40</sup> Wendy Brown and Janet Halley, "Introduction" in Brown and Halley eds, *Left Legalism/Left Critique* (Durham: Duke University Press, 2002).

<sup>41</sup> Susan B Boyd, Dorothy E Chunn, Fiona Kelly, and Wanda Wieggers, *Autonomous Motherhood? A Socio-legal Study of Choice and Constraint* (Toronto: University of Toronto Press, 2015); Shelley AM Gavigan and Dorothy E Chunn, "Introduction" in Gavigan and Chunn eds, *The Legal Tender of Gender: Law, Welfare and the Regulation of Women's Poverty* (Oxford: Hart Publishing, 2010); Dorothy Roberts, *Killing the Black Body* (New York: Pantheon Books, 2007); Brenda Cossman and Judy Fudge, "Introduction" in Cossman and Fudge eds, *Privatization, Law and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002).

custody of their children. Single, or functionally single mothers would be accorded a sphere of “autonomy” if they conducted themselves and their children accordingly. For mothers that were found to be “idle or dissolute” that is, mothers who, without social assistance as we know it today, turned to prostitution to protect and provide for their children, they would find themselves confronted with absolute coercion – legally-sanctioned, yet virtually unchecked power to remove the child from her care, possibly never to see the child again.

But the “idle and dissolute” mother was not just the mother that would be confronted by both the Society and the criminal law regime in its most punitive guise, she was also the “pauper” mother who was unworthy of either municipal or philanthropic support. In this thesis I will investigate how the moral regulation of families in poverty, and especially mother-headed families, as “undeserving” or “unworthy” of public support, has likewise served to inform the construction of harm and best interests in child protection law and jurisprudence. Furthermore, I will show how, throughout the history of child protection law in Nova Scotia, the families singled out as undeserving, idle, and dependent in welfare discourse were often the families determined as “feeble-minded”, “neurotic”, and “high-risk” in the child protection system. In particular, I am interested in how these shifting evaluations of deservedness, harm and best interests by welfare professionals have served to shape ideas about family autonomy for families in poverty as well as the scope of public responsibility for these families. I will investigate what role judicial decision making has played in adjudicating upon the harms and best interests of children, in either challenging or reproducing these social norms.

With the passing of the first child protection act the Nova Scotia legislature not only set out the harms to children that would justify an intrusive intervention into the family, but it affirmed the presumption of family autonomy in a liberal society. Jurisprudence adjudicating upon these harms and best interests has drawn upon and either challenged

and reinforced prevailing social norms about the family, in the process setting out the content of family autonomy for families in poverty. But in setting out the public/private divide for families in poverty, child protection law and jurisprudence also set out where private responsibility ends and public responsibility for the child and the family begins. In this thesis I will examine how harms to children that are defined at law and adjudicated upon either challenge or reinforce prevailing ideas about the proper scope of public support for families in poverty.

I take a critical feminist approach to analysing the divide; one that sees that public/private divide has been used to obscure the operations of power, by constructing the private space of the family as a natural sphere free of regulation.<sup>42</sup> As feminist theorists have shown, the private sphere of the family has always been shot through with social and legal regulation, promoting or challenging patriarchal and sexualized relations of power.<sup>43</sup> It is often the position of the mother as the primary caregiver of children and the primary caretaker in the private sphere, which has served as a counterpoint to outside intervention; simultaneously justifying the absence and necessity of intervention inside the private sphere of the family. Throughout the history of child protection law it is often the figure of the mother which has characterized the need outside intervention into the family; if she is “intemperate”, “idle”, “unfit”, or “high risk”. On the other hand, when the public sphere pulls back responsibility to support families in poverty, it is the mother in poverty, and her work in the private sphere which compensates.<sup>44</sup> In investigating how the child protection

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<sup>42</sup> Susan B Boyd, *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) at 9-10.

<sup>43</sup> See for example, Frances E Olsen, “The Family and the Market: A Study of Ideology and Legal Reform” 96 (1983) Harv LR 1497; Linda Gordon, “Family Violence, Feminism, and Social Control” (1986) 12 Fem Stud 452 at 458-459; Catharine A MacKinnon, *Toward A Feminist Theory of the State* (Cambridge: Harvard University Press, 1989).

<sup>44</sup> Cossman and Fudge, *supra* note 41 at 27-28.

law and jurisprudence has informed the public/private divide for families in poverty, then, I will detail how this divide has either reinforced or challenged patriarchal relations and the consequences this has had for women and children in poverty.

In the early era of cruelty to children and the introduction of the *Prevention and Punishment of Wrongs to Children Act*, the terms of the public/private divide were being redrawn. The private sphere of the nuclear family was re-ordered by law and society to take greater responsibility for the needs of its members. A growing fear of “pauperism” and “dependency” saw a greater interest in distinguishing between the “deserving” and “undeserving” poor. Assistance to the undeserving able-bodied poor was provided sparingly, grudgingly and on a crisis basis, only, in the understanding that work, not poor relief was the proper way to provide for the poor. Work, however, did not include the reproductive labour of women and mothers in the household. Over the past several decades, social policy scholars have noted how we are seeing a re-emergence of expanded definitions of “undeserving poor” in the provision of social services, including a shift back to a more restrictive, residual era of child protection services.<sup>45</sup>

Much like the era in which the *Prevention and Punishment of Wrongs to Children Act* was introduced and enforced, it is not the public sphere, but the family and the marketplace where the poor are meant to seek support. Only certain members of the family

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<sup>45</sup> See for example, Hester Lessard, “Empire of the Lone Mother: Parental Rights, Child Welfare Law, and State Restructuring” 39 *Osgoode Hall LJ* 717 at 725. A definition of residual services is provided in Charles Zastrow, *Introduction to Social Work and Social Welfare: Empowering People*, 10<sup>th</sup> ed (California: Brooks/Cole, Cengage Learning, 2010) at 6:

[S]ocial welfare services should be provided only when an individual’s needs are not properly met through other societal institutions, primarily the family and the market economy. According to the residual view, social services and financial aid should not be provided until all other measures or efforts have been exhausted, including the individual’s and his or her family’s resources. In addition, this view asserts that funds and services should be provided on a short-term basis (primarily during emergencies) and should be withdrawn when an individual or the family again becomes capable of being self-sufficient.



are understood as deserving of support. Feminist scholars of the welfare state argue that with increasing privatization we are seeing poor women, and in most cases, poor single mothers becoming a particular focus of social policy. As Judy Fudge and Brenda Cossman explain, “Privatization has come to represent a fundamental shift not only in government policy but also in the balance of public and private power.”<sup>46</sup> As the state withdraws support from the public sphere, these authors argue, so women are left to shoulder a disproportionate share of the work of social reproduction.<sup>47</sup> Social reproduction and dependency are increasingly seen as private matters, obfuscating the value of women’s work within the home.<sup>48</sup> This privatization of responsibility not only serves to relieve the state of responsibility but it serves to naturalize a particular gender order.<sup>49</sup>

The consequences of this new gender order are particularly problematic for socio-economically marginalized women, that is, women who are subordinated at the intersections of patriarchy, racism, classism and ableism. In particular, feminist theorists have noted how, in a neoliberal era, women who are deemed unworthy of public support are likewise constructed as threats to society for whom even the most coercive interventions are justified.<sup>50</sup> Welfare theorists have shown how neoliberal restructuring has resulted in women on assistance being subjected to more punitive systems of discipline

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<sup>46</sup> Cossman and Fudge, *supra* note 41 at 4.

<sup>47</sup> *Ibid.*

<sup>48</sup> See for example, Martha Fineman, “Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency” (1999) 8.1 *Am Uni J of Gender, Soc Pol and L* 13 at 14.

<sup>49</sup> Cossman and Fudge, *supra* note 41 at 10.

<sup>50</sup> Anna Marie Smith, *Welfare Reform and Sexual Regulation* (New York: Cambridge University Press, 2007).

and surveillance.<sup>51</sup> For example, in their work on the experiences of abused women on assistance, Janet Mosher et al, have detailed how women on assistance today are made more vulnerable to abuse:

The findings from our research project make clear that women who flee abusive relationships and turn to welfare seeking refuge and support frequently find neither. Women's experiences of welfare are often profoundly negative. Women struggle to survive with their children on little income, often going without adequate food, shelter and clothing. They encounter a system that is less than forthcoming about their entitlements, and about the multiple rules with which they must comply. Their hopes of training and employment through workfare participation are almost invariably dashed. They are often subjected to demeaning and humiliating treatment from workers within a system in which suspicion and the devaluation of recipients are structured into its very core. For many the experience of welfare is like another abusive relationship. And virtually every woman with whom we spoke was caught in one or more double binds as she struggled to be a good mother, good worker and good citizen. Disturbingly, the decision to return to an abusive relationship is often the 'best' decision for a woman, in a social context of horrendously constrained options.<sup>52</sup>

In an era where social policy is focused on privatization, it is a matter of social justice to subject law's ostensibly neutral categories to critical examination in order to understand the ways in which they further socio-economic marginalization. Placing law's neutral categories in historical perspective helps to illuminate their contingent character.

In this project I hope to contribute to an understanding of the way that child protection law is involved in this "re-regulation" in an era of advanced liberalism and privatization. In particular, I hope to understand how this re-regulation has resulted in a coercive rather than a supportive engagement with families in poverty. A trend towards a more coercive intervention into the lives of families has been noted in Nova Scotia in the

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<sup>51</sup> Dorothy Chunn and Shelley AM Gavigan, "Welfare Law, Welfare Fraud, and the Moral Regulation of the 'Never Deserving' Poor" (2004) 13 Soc & Leg Stud 219; Dorothy Roberts, "Child Protection as Surveillance of African American Families" (2014) 36 J of Social Welfare Family Law 426.

<sup>52</sup> Janet Mosher, et al, *Walking on Eggshells: Abused Women's Experiences of Ontario's Welfare System*, Final Report from the Woman and Abuse Welfare Research Project (5 April 2004) at v, online: York University <[http://www.yorku.ca/yorkweb/special/Welfare\\_Report\\_walking\\_on\\_eggshells\\_final\\_report.pdf](http://www.yorku.ca/yorkweb/special/Welfare_Report_walking_on_eggshells_final_report.pdf)>.

most recent report of Nova Scotia's Minister's Advisory Committee on the *Children and Family Services Act* and *Adoption Information Act* (May 2008). The 2008 report contained the rather disturbing observation that:

Reports from social workers and professionals of support services echo the statement by J. Lafrance that "The overall paradigm in child protection agencies seems to be moving toward increasing power and control over clients and away from interpersonal elements necessary for the achievement of child welfare activities which are central to agency goals."<sup>53</sup>

Without understanding the ways in which the ostensibly neutral categories of child protection law can end up reinforcing a coercive regulation of families in poverty, we will be perpetuating harm against women and children in poverty and reinforcing a residual model of social service provision. Furthermore, failing to understand how the neutral categories of child protection law assist in constructing a particular vision of family autonomy for families in poverty, risks reinforcing larger processes of social and economic inequality.

### **A Critical Historical Analysis of Child Protection Law in Nova Scotia**

Nova Scotia is a particularly fruitful place to study the history of child protection law. First, Nova Scotia, along with New Brunswick, were the only provinces to inherit the Elizabethan *Poor Law*<sup>54</sup> in much the same form as it existed in England. A critical history of social welfare and child protection in Nova Scotia reveals both the disjunctures and continuities between the antiquated ideas of the *Poor Law* and the ostensibly "modern" social assistance laws. Perhaps because of its *Poor Law* inheritance from Britain and perhaps because of its close connections to the Commonwealth of Massachusetts, Nova

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<sup>53</sup> Nova Scotia, Minister's Advisory Committee on Children and Family Services Act and Adoption Information Act, *Report* (Halifax: Nova Scotia Community Services, May 2008) at 47.

<sup>54</sup> SNS 1758, Title 72, no 12.

Scotia has always been somewhat unique in Canada in the way that it has approached poverty and related social problems. Joseph Howe's impassioned speech which promoted so much social and political change in the province was a soliloquy against the "Mansions of Woe"; the workhouse erected as part of the *Poor Law*.<sup>55</sup>

From the mid- to –late 19<sup>th</sup> century Halifax became a city of social reformers. The religious institutions that are thought to be the cause of much conservative thinking in the province, in fact generated a great deal of social reform in the late 19<sup>th</sup> century. Women in particular became active members of the temperance movement and pushed for, what were at the time considered progressive social reforms. The development of the Society for the Prevention of Cruelty and the passing of the *Prevention and Punishment of Wrongs to Children Act* are but several examples.

Nova Scotia was the first province to have a Society for the Prevention of Cruelty and the first province to have child protection legislation in the sense that we know it today: setting out the grounds of harm that justify state removal of children from parental care and custody and provision for judges to make child placement decisions on the basis of the welfare of the child. In the "domestic relations" arena, Nova Scotia is a province of firsts. Nova Scotia was one of the first jurisdictions in Canada to grant judicial divorces and alimony. And Nova Scotia was also one of the first provinces in Canada to have a juvenile court. Close British and American connections were no doubt responsible for Nova Scotia being the place of so many firsts in the welfare and child protection fields;

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<sup>55</sup> Per Joseph Howe in Joseph A Chisholm, ed, *The Speeches and Public Letters of Joseph Howe*, 2 vols (Halifax: Chronicle Publishing Co, 1909) at 67. The following is the relevant excerpt from Howe's famous libel trial speech referring to the Halifax poor house:

From six in a bed in those mansions of woe,  
Where nothing but beards, nails and vermin do grow,  
And from picking of oakum cellars below,  
Good Lord, deliver us!

however, these firsts were also a matter of necessity. Nova Scotia experienced an era of economic boom and bust in the mid-to-late 19<sup>th</sup> century which resulted in an economic depression at a time when many provinces in the new Canada were experiencing relative economic prosperity. The “age of wood, wind and sail” gave way to the age of industrial capitalism which only some parts of Nova Scotia were able to take advantage of.<sup>56</sup> The resulting economic depression and out-migration created a society in dire need of social reform and early family law as well as the child protection reforms provided one way to address the growing social problems within the province, but within the city of Halifax, in particular.

Because much of the philanthropic activity that resulted in the development of the child protection and then juvenile delinquent systems happened in Halifax in the late-19<sup>th</sup>-early 20<sup>th</sup> centuries, the early chapters of this thesis focus on Halifax and not the rest of Nova Scotia. The application of the *Poor Law* differed as between Halifax and the counties. In the counties, the *Poor Law* provided that the poor could be provided for by “outdoor relief” whereas in Halifax the poor could only be provided for by “indoor” relief. This means that in Halifax, poor relief was provided by the *Poor Law* only if recipients agreed to enter and reside in the Poor House.

Halifax at the end of the 19<sup>th</sup> century was a city of social reformers, but it was also a city of asylums. These asylums eventually became specialized and had a great effect on the way that work with the poor was carried out. No longer would whole families be placed in the Poor House, but the “deserving poor” that is, children and the non-able-bodied “infirm”, would be placed in specialized, modern asylums for the time. This reform had a great effect on the way that social welfare would be carried out in this province. The great

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<sup>56</sup> Alan Brookes, “Out-Migration from the Maritime Provinces, 1860-1900” (1976) 5.2 *Acadiensis* 26 at 28.

concentration of both state and non-state agents of social reform in the city of Halifax, furthermore, means that the greater body of historical documentation comes from agents in the city. The Society for the Prevention of Cruelty was situated in Halifax, as was the juvenile court and the Superintendent of Neglected and Delinquent Children, and as such, much of the historical record comes from agents and organizations in Halifax and not the counties.

While I use many primary legal sources, including reports of juvenile court judges and Commission Reports, I rely primarily upon legislation and case law to understand how transitions in the various stages of child protection work were effected by law.<sup>57</sup> But these historical materials are not sufficient to give us the whole picture, not only of how child protection law operated, but of how social policy, philanthropy and psychiatry influenced the form and content of child protection law. When it comes to the history of social welfare policy and the history of child protection practice as well as the practice of other human service professionals, I have relied upon secondary sources compiled by historians of those fields as well as secondary sources from legal historians. While this thesis necessarily looks to social welfare history and the history of the work of both philanthropic volunteers and human service professionals, as indicated upon, this history is presented only to gain insight into possible larger social and political questions to which child protection law and jurisprudence may be responding. Rather, this is a critical feminist thesis, which situates

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<sup>57</sup> A note about historical sources is pertinent here. As there are few reported child protection decisions from this time I have focused analysis on the statutes themselves – both child protection statutes and married women’s property statutes – in order to show how law was involved in transforming the family and transforming intervention in the family. Furthermore, because child protection work was solely undertaken by the Society for the Prevention of Cruelty I have consulted the notebooks of the Society in order to understand how the agents active in child protection work at the time saw their work.

child protection law in historical perspective.<sup>58</sup> It is first and foremost a thesis about the emergence and development of a particular form of legal regulation.

The first chapter of the thesis (Chapter 2) will begin by examining the social and legal context in which the first Society for the Prevention of Cruelty and the first child protection legislation in Canada, emerged. I will situate the emergence of the Society and the *Prevention and Punishment of Wrongs to Children Act* within family law and social welfare reform in the province. I will examine how family law reform marked a fundamental change in the family regulated by the common law and how it paved the way for legislated intervention into the family. This period is important not just because it marks the beginning of the development of child protection law in its modern form, but it also marks a period of significant change in the family, the economy, in society and in politics in Nova Scotia. The development of married women's property statutes and child protection legislation, I argue, mark a sign of significant transition of the Victorian family and the emergence of social legislation to respond to this transition. I will show that child protection law emerged as a result of the work of the Society for the Prevention of Cruelty and was influenced by the particular socio-economic and political needs of the day. I have therefore used secondary sources in order to get a full picture of what social, economic and political forces were at play at this time, and how they worked to influence the development of child protection law.

After examining the emergence of child protection law in the province, the successive chapters will track moments of transition in the development of this law; that is, moments where we see the goals and techniques of the child protection law and jurisprudence begin to change. The first major moment of transition of child protection

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<sup>58</sup> In this regard I have been influenced by the critical historical work of scholars such as Janet Halley, "What is Family Law: A Genealogy, Part I" (2011) 23 Yale JL & Hum 1; Joan Sangster, *Regulating Girls and Women: Sexuality, Family, and the Law in Ontario, 1920-1960* (Toronto: Oxford University Press, 2001); Dorothy Chunn, *From Punishment to Doing Good: Family Courts and Socialized Justice in Ontario, 1880-1940* (Toronto: University of Toronto Press, 1992).

law after its emergence, came some two decades after the passing of the *Prevention and Punishment of Wrongs to Children Act*, with the development of the juvenile court and the focus on the delinquent child. In Chapter 3 I look at both the juvenile delinquency and child protection legislation that was introduced in the first decades of the 20<sup>th</sup> century, however, as decisions of the juvenile court were not recorded I have had to rely upon annual reports of the juvenile court judge and the Superintendent of Neglected and Delinquent Children. These annual reports – attached as appendices to the Journals of the Legislative Assembly – provide a wealth of insight into what child protection and juvenile delinquency reformers of the day understood as their role. We see in the reports of the juvenile court judge a great deal of emphasis first on religious upbringing, and then on insights coming from psychiatric and medical discourses beginning to influence child protection law.

In Chapter 3, I look at how child protection law transitioned from an emphasis on cruelty to children, and the use of the criminal and philanthropic experts to address the problem to a system premised on a “socialized justice” approach to regulating deviancy and delinquency. Towards the end of Chapter 3, however, I have used recorded decisions of appeals from juvenile court decisions to note that there was some challenge to the socialized justice of the juvenile courts. Although I looked for any recorded decision decided under the child protection legislation between 1882 and 1950, only a handful could be found in the law reports and these are all summarized and analyzed in Chapter 3. The dearth of cases reveals that there was not a great deal of appellate activity in terms of appealing juvenile court decisions until we see the recorded decisions emerging from the family courts in the 1970s in Nova Scotia. This is not surprising, given the lack of access to justice that would have been experienced by families living in poverty at the end of the 19<sup>th</sup> century to the middle of the 20<sup>th</sup>.



The second period of transition within child protection law and practice occurred in the post-war period. However, because this transition is not immediately recognizable in Nova Scotian jurisprudence until the 1970s, I examine the transition to a jurisprudence of “natural parental rights” issuing from the Supreme Court of Canada in the 1950s. Beginning in the 1950s, the Supreme Court of Canada began to hear a number of cases involving either single mothers or two-parent families wishing to revoke their previously-given consent to adoption. These cases at the Supreme Court eventually became known as the trilogy of “natural parental rights” cases<sup>59</sup> and they had an important effect on the way that judges intervened in marginalized families to relieve them of parental authority over their children.

A decade after the release of these cases, child protection jurisprudence began to proliferate in Nova Scotia. Not just because the Supreme Court jurisprudence opened up ways to challenge the legislation, but because of the development of family courts and the more frequent provision of written decisions. These written decisions – both trial and appellate level – that began to emerge from the 1970s on, form the bulk of the material I will be analysing from the end of Chapter 4 going forward. I have focused in on reported child protection cases where it is evident that judges are grappling with the legal significance of the Supreme Court of Canada trilogy. Between the early 60s to the mid-1970s there are few recorded child welfare cases in Nova Scotia and as such I have summarized the bulk of those cases in Chapter 4. Chapter 4 ends, however, by exemplifying how, despite the progressive potential of natural parental rights, the legal concept was still capable of accommodating a repressive regulation of marginalized

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<sup>59</sup> *Martin v Duffell*, [1950] SCR 737, 4 DLR 1; *Hepton v Maat*, [1957] SCR 606; and *Agar v McNeilly*, [1958] SCR 52.

mothers. As such, the Chapter ends with an analysis of a number of cases in which we can see the malleability of the concept of “fitness” in particular.

In Chapter 5 I will argue that the introduction of the *Children and Family Services Act* in 1991 marked a more objective and rights-based act than the child protection acts that had been introduced before it. Because my concern in chapter 5 is to capture how it is that a transition to a rights-based “least intrusive intervention” model of child protection law introduced by the *Children and Family Services Act* transformed the problems posed for child protection law, I will be focusing my research mostly on trial level decisions decided under the *Children and Family Services Act*. The benefit of focusing on trial level decisions is that, in dealing with facts as well as law, they give us an important insight into what types of families are involved in child protection law, what harms and risks of harm form the grounds of intervention into the family. Trial level decisions also provide insight into the content of what judges understand as the best interests of the children involved. In these trial level decisions I will be searching for specific changes in the way trial judges interpret notions of family autonomy, harm, risk, and best interests – the central organizing concepts of child protection law – in order to understand how these concepts have either served to reinforce or challenge the processes of privatization that have proven so hostile to the needs of the poor, and of mothers in poverty, in particular.

### **A Feminist Understanding of the Social Regulation of Families in Poverty**

The legal regulation of the family in poverty is incomprehensible without also understanding how welfare policy has come to affect the lives of these families. In Chapter 4 I will detail how social assistance emerged in this province at the behest of child protection authorities attempting to keep families in poverty together and ensure that children were being raised not in institutions, but in the homes of “fit” and proper mothers. Furthermore, the lives of families in poverty are deeply affected by welfare policy, both

financially and in terms of how they are, as the recipients of assistance, constructed in society at large. Welfare eligibility has since the *Poor Law* been premised on notions of whether one is “deserving” or “undeserving” of public support. The emergence of the *Prevention and Punishment of Wrongs to Children Act* occurred at a time when the Victorians were particularly focused on the child as innocent and deserving of public support. This construction of the child, I will show, had important effects on how public assistance was administered in the province at that time.

As tenBroek pointed out in his study on the dual systems of family law, family laws for the poor were often tied to welfare and were designed with fiscal concerns in mind.<sup>60</sup> Illegitimate children’s acts, for example, not only set out who was considered “illegitimate” but they also set out who had responsibility for the maintenance of these children.<sup>61</sup> The history of modern welfare reform in Nova Scotia has been premised upon determining eligibility for certain *types* of families. In Chapter 4 I will show how the introduction of a provincial system of welfare in Nova Scotia by way of the Mothers’ Allowance is a prime example.

The introduction of Mothers’ Allowances in the 1930s was administered wholly upon the type of family at issue and in particular, as the name suggests, wholly focused on the mother and her marital status. The early decades of Mothers’ Allowances in Nova Scotia saw only widows, and the wives of disabled men eligible for the allowances; unwed mother-headed families were not seen as the family forms that the province wanted to legitimate by providing assistance. The provision of assistance to widowed families and to the families of disabled men had an effect on the position of these families within the child protection system. With the provision of material assistance to these families they would

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<sup>60</sup> tenBroek, *supra* note 7 at 980.

<sup>61</sup> *Maintenance of Bastards Act*, SNS 1851, c 91.

not have to rely on the child caring institutions in the city or on the assistance of philanthropic societies such as the Society for the Prevention of Cruelty or the Children's Aid Society in order to care for their children. By supporting these families in poverty with publicly-provided assistance, the province began to develop a preventative, welfarist system of child welfare that was more supportive of eligible families, rather than acting merely as a residual system to take in children in moments of crisis. This welfarist, preventive system, however, was not available to all families equally as long as Mothers' Allowance was provided only to certain types of mother-headed families.

Contrary to tenBroek's thesis, then, feminist welfare historians have argued that this focus on women, and especially single mothers on assistance, has not been the result purely of a desire to minimize the costs of welfare in the name of bourgeois interests. Instead, they argued that welfare policy has at times utilized the private space of the family to promote overarching systems of power and domination, and at times to challenge it. As Shelley Gavigan and Dorothy Chunn explain:

[F]eminists in different jurisdictions have demonstrated that, in many ways, the history of all welfare states is inextricably bound up with the history of women and women's struggles within and against the state. In particular, feminist socio-legal scholars problematize women as agents of change and emphasize the complex and contradictory contributions of law, state and welfare policy to the social and legal position of women.<sup>62</sup>

As many welfare scholars have shown, the history of welfare reform has been the history of the instituting and challenging of the intersecting systems of patriarchal, racial, sexualized and ableist oppression.<sup>63</sup>

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<sup>62</sup> Gavigan and Chunn, "Introduction", *supra* note 41 at 2-3.

<sup>63</sup> See, for example, Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare, 1890-1935* (Cambridge: Harvard University Press, 1994); Margaret Jane Hillyard Little, *'No Car, No Radio, No Liquor Permit': The Moral Regulation of Single Mothers in Ontario, 1920-1997* (Oxford: Oxford University Press, 1998); Janet Guildford, "The End of the Poor Law: Public Welfare Reform in Nova Scotia before the Canada Assistance Plan" in Judith Fingard and Janet Guildford eds, *Mothers of the Municipality: Women, Work and Social Policy in Post-1945 Halifax* (Toronto: University of Toronto Press, 2005).

Sociologists have developed a number of concepts with which to understand the way in which state and state policies govern individuals in poverty in a liberal capitalist society. Sociological theorists in the late 19<sup>th</sup> century developed the concept of “social control” in order to understand the maintenance of social order, whether by coercive means such as through law, or by less explicitly coercive processes such as the organization of work or education.<sup>64</sup> Social control theory in the 1960s and 70s focused on how state agents, in the course of controlling deviance, in fact reproduced deviance through the process of labelling.<sup>65</sup> And eventually, social control theory became a means with which Marxist theorists analysed the ways in which the ruling classes exerted control over the working class.<sup>66</sup> However, social control theory and its emphasis on the repressive nature of the state, was unable to account for the agency of individuals and groups in challenging or acquiescing to state control.<sup>67</sup> In other words, as the quote from Chunn and Gavigan sets out above, social control theory was unable to problematize individuals as agents of social change.

Furthermore, theorists have shown that social control critiques are unable to account for the ways that families have been dealt with by child protection authorities in particular. As Linda Gordon has pointed out in her study of the Massachusetts Society for the Prevention of Cruelty to Children from 1870-1920, the history of the regulation of child abuse requires a more nuanced understanding of the agency of mothers, especially.<sup>68</sup> The

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<sup>64</sup> Dorothy E Chunn & Shelley AM Gavigan, “Social Control: Analytical Tool or Analytical Quagmire?” (1988) 12 *Contemporary Crises* 107 at 108.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid* at 109.

<sup>67</sup> *Ibid* at 118.

<sup>68</sup> Linda Gordon, “Single Mothers and Child Neglect 1880-1920” (1985) 37 *Am Quart* 173; Gordon, “Family Violence, Feminism, and Social Control”, *supra* note 43 at 458-459.

Massachusetts Society for the Prevention of Cruelty to Children, much like Nova Scotia's Society for the Prevention of Cruelty, was a group of early philanthropists who carried out early child protection work before the establishment of Children's Aid Societies. Gordon argues that when studying how these philanthropic societies engaged with families in poverty to address cruelty to children, "None of the social control critiques can adequately conceptualize the complex struggles" of the families with which these early child savers were involved.<sup>69</sup> Social control assumes that outside forces act repressively upon the private sphere of the family. However, Gordon argues that in many instances, women in poverty called upon the philanthropists involved with the Society and invited them into the home.

Instead of seeing the women that called upon the Society for assistance as victims, Gordon's study shows that they "maneuvered to bring child welfare agencies into family struggles on their sides."<sup>70</sup> She writes that while there "was no Society for the Prevention of Cruelty to Women, but in fact women...were trying to turn the SPCC into just that."<sup>71</sup> Therefore, Gordon argues that the fact, "That family violence became a social problem at all, that charities and professional agencies were drawn into attempts to control it, were as much a product of the demands of those at the bottom as of those at the top."<sup>72</sup> Gordon warns that social control critiques can often over determine the power of professionals to oppress persons in poverty. She warns that we must not overlook the very real harms that

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<sup>69</sup> "Family Violence, Feminism and Social Control", *ibid* at 458.

<sup>70</sup> *Ibid*.

<sup>71</sup> *Ibid* at 472.

<sup>72</sup> *Ibid* at 475.

are being perpetrated by family violence in a bid to understand the power effects of how the problem of family violence is defined and addressed.<sup>73</sup>

Particularly important for this thesis, Gordon argues that social control as a critique assumes a private sphere of the family which has been immune from regulation. The private sphere of the family is conceived of in terms of a natural sphere of autonomy while social control theories see the public sphere is invasive and coercive. In contrast, she argues that “no family relations have been immune from social regulation” and further, that the history of this social regulation is not just about domination, but about conflict.<sup>74</sup>

In order to move beyond a social control critique, sociologists Philip Corrigan and Derek Sayer developed a notion of moral regulation to account for the ways in which state agencies can draw upon moral projects to maintain social order. The development of moral regulation theory is generally attributed to their work in *The Great Arch*, in which they write of moral regulation as:

[A] project of normalizing, rendering natural, taken for granted, in a word “obvious” what are in fact ontological and epistemological premises of a particular and historical form of social order. Moral regulation is coextensive with state formation, and state forms are always animated and legitimated by a particular moral ethos. Centrally, state agencies attempt to give unitary and unifying expression to what are in reality multifaceted and differential historical experiences to groups within society, denying particularity.<sup>75</sup>

Corrigan and Sayer’s work posited how the British state normalized bourgeois beliefs and interests as the shared values of British society; rendering natural beliefs and values which were counter to the interests of the working class. The conduct of the working class was depicted as counter to a natural moral order and linked to negative social

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<sup>73</sup> *Ibid* at 473.

<sup>74</sup> Gordon, “Family Violence, Feminism and Social Control,” *supra* note 43 at 470.

<sup>75</sup> Philip Richard D Corrigan and Derek Sayer, *The Great Arch: English State Formation as Cultural Revolution* (Oxford: Blackwell, 1985) at 4.

consequences. Moral regulation as a method of maintaining social order has been explained by Alan Hunt as taking the following general form:

In summary, moral regulation involves the deployment of moral discourses which construct a moralized subject and an object or target which is acted upon by means of moralizing practices. The implication of this conceptualization is that the 'moral' dimension is not a distinctive characteristic of the regulatory target but rather is found in the linkage posited among subject, object, practices and their projected social consequences.<sup>76</sup>

State practices in maintaining social order may not be wholly repressive. They may encourage individuals and groups to internalize certain values and beliefs and to govern themselves accordingly. In Corrigan and Sayer's work, they show, however, how these moralized values and beliefs were in fact beliefs and interests with a particular political and economic function. Their work is very much focused first, on the state and state agencies, and second, on how moral regulatory practices are engaged to reinforce class relations.

However, again, critical feminist theorists of welfare reform caution that the history of welfare reform and its effect on the position of women on assistance is not understandable with a focus on the maintenance of class relations only. In her 1998 book, *No Car, No Radio, No Liquor Permit: The Moral Regulation of Single Mothers in Ontario, 1920-1997*, Margaret Jane Hillyard Little has applied moral regulation as a lens through which to understand the regulation of single mothers on social assistance in Ontario. She writes that in her 70-year retrospective of Mothers' Allowance in that province, moral regulation theory revealed not just class inequality, "but also, gender, race, and sexual inequalities."<sup>77</sup> Contrary to a strict Marxist approach, Little argues that understanding the

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<sup>76</sup> Alan Hunt, "Moral Regulation and Making-up the New Person: Putting Gramsci to Work" (1997) 1.3 *Theoretical Criminology* 275 at 280.

<sup>77</sup> Little, *supra* note 63 at xviii.



moral regulation of single mothers reveals that not all policies of Ontario's Mothers Allowance functioned to reinforce "bourgeois economic interests". She writes:

There were other less costly and less cumbersome bureaucratic processes to ensure that the poor subdued workers' demands for better wages and remained a ready reserve army of labour. Also, the investigation of minute aspects of a single mothers' life – which included her dress, language, attitude and behaviour – could not be justified in purely economic terms. These intrusive procedures suggest that gender, race, and sexual definitions of morality often predominated in the everyday administration of this policy.<sup>78</sup>

Little writes that the types of mother-headed families that received mothers allowance was based upon a determination of moral worthiness, particularly in the early years of the program. Widows who had lost their husbands were determined to be morally blameless for their poverty and therefore eligible for assistance. Central to this notion of the moral worthiness of women was the idea that the root of poverty was individual blameworthiness. Only those women who could be equated with a morally upright motherhood could be seen as blameless for their poverty. It was only these women, who as circumstances would have it, had lost their male breadwinner, whose assistance the state had the obligation to ensure. Unwed mothers, on the other hand, because of their presumed sexual promiscuity having conceived a child out of wedlock, were not eligible for assistance and were deemed unworthy. Thus, the provision of allowances relied upon dividing between the deserving and undeserving in determining eligibility and drawing upon racialized, gendered, and sexualized norms to do so.

The history of welfare is replete with the moral regulation of women and racialized families and the construction of the deserving/undeserving poor.<sup>79</sup> This construction has

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<sup>78</sup> *Ibid.*

<sup>79</sup> Alan Hunt argues that the history of the construction and regulation of poverty in general has been an arena of moral regulation. See Hunt, *supra* note 76 at 280-81:

'[P]overty' has historically been predominantly an arena of moral regulation not because poverty is necessarily a moral issue, but because the construction of its objects of regulation have been moralized (vagrancy, paupers, idleness, etc). It was only with the 'discovery of

important implications for how the state encounters the subject of assistance. The deserving poor are more likely to receive assistance without stigma while the undeserving poor tend to be penalized by a more repressive interaction with agents of welfare. High levels of surveillance, intrusions on privacy and punitively low assistance rates are but some of the ways in which welfare policy structure the interaction with the undeserving poor.

In order to understand how law and welfare policy intersect to regulate the lives of families in poverty, then, it is important to understand how law is involved in promoting or challenging the moral regulation of women as wives and mothers and how this reinforces or challenges overarching gendered, racialized and sexualized inequalities. Depicting unmarried mothers as presumptively morally blameworthy and undeserving has wider consequences for the position of women in general – for assumptions about proper sexuality, about race, ability, and about women’s roles in the family and society – and without understanding how law and welfare perpetuate these ideas we will not be grasping how the state and legal system perpetuates or challenges the subordination of women and how the legal regulation of the family plays into this subordination.

In the history of child protection law and of welfare in general we see a number of instances where child protection law and practice draws upon this moral regulation of families in poverty, particularly where this moral regulation aligns with the interests of welfare policy. Early temperance movements which moralized drinking and extrapolated to a range of social consequences as a result of intemperance were integral to the emergence of cruelty to children as a legal problem. Anxiety over juvenile delinquency and

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unemployment’ at the end of the 19<sup>th</sup> century as something that was the result of economic processes rather than individual fault that it became, for a period at least, a matter of socio-economic rather than moral regulation, only to return more recently to the moral realm with the discovery of ‘welfare scroungers’.

deviance of the children of the poor gave rise to the juvenile delinquents system which helped to professionalize and bureaucratize child protection work in Nova Scotia. And finally, the moral regulation of unwed mothers and a deep suspicion of their deviant sexuality provided a major focus of child protection and child welfare work late into the late-1960s in this province. Without understanding how law informs or is informed by this moral regulation – that is, the “rendering natural, taken for granted, in a word ‘obvious’ what are in fact ontological and epistemological premises of a particular and historical form of social order” – we are unable to grasp the significance for families in poverty, of the concepts that law uses to both pose, and address, the problem of harm to children.

### **Psychiatry and the Social and Legal Regulation of the Family in Poverty**

The categories of liberal legalism which make up the child protection system such as harm and risk of harm to the child, family autonomy, and the best interests of the child, are presented as ostensibly neutral, objective categories. How do we explain, therefore, the influence of a moralized form of regulation on a system of thought that sees itself as divorced from morality? Further, in a contemporary legal era that is much more alive to gendered and raced oppression than earlier years, how do we explain the influence of moral regulation which is suffused with gendered and raced assumptions of propriety and fitness? The answer may lie in interaction between law, psychiatry,<sup>80</sup> and moral regulation.

Nancy Fraser and Linda Gordon, for example, have written how in the United States welfare discourse has associated welfare “dependency” with individual pathology.<sup>81</sup>

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<sup>80</sup> See Judith Mosoff, “Motherhood, Madness, and Law” (1995) 45 UTLJ 107.

<sup>81</sup> Nancy Fraser and Linda Gordon, “A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State” (Winter 1994) 19.2 *Signs* 309 at 325.

They write that in the United States, the discourse of welfare dependency is increasingly associated with matters of a pathological constitution – addiction, psychological predisposition in teen mothers to show moral/psychological immaturity, codependency, etc.<sup>82</sup> In this way, moral evaluations about the proper conduct of women and mothers are hidden behind supposedly objective psychological evaluations. While contemporary society recognizes the inappropriateness of overtly racial and gendered uses of the concepts of dependency and pauperism that were used in welfare’s past, Fraser and Gordon write that, “The moral/psychological register is expanding, therefore, and its qualitative character is changing, with new psychological and therapeutic idioms displacing the explicitly racist and misogynous idioms of the industrial era.”<sup>83</sup> This expanding of the moral/psychological register in welfare policy has also seen echoes in contemporary child protection policy. Increasingly, the knowledge of psychological and psychiatric professionals is called upon to assess the potential risk posed by parents to a child. However, as some theorists have argued, this psychiatric prediction of risk has served to interpret the consequences of social and economic inequality – much as moralizing judgements once did – as the consequence of individual pathology.<sup>84</sup>

While the early years of child protection work were carried out by philanthropists and other “child-savers” who relied upon an overtly moralized and religious discourse, child protection knowledge beginning in the early 21<sup>st</sup> century relied heavily upon the insights of medicine, psychology and psychiatry. As I will detail in Chapter 3 of this thesis, by the early decades of the 21<sup>st</sup> century child protection work was carried out within the

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<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid* at 317.

<sup>84</sup> See Karen Swift, “Risky Women’: The Role of ‘Risk’ in the Construction of the Single Mother” in Shelley AM Gavigan and Dorothy E Chunn, eds, *Legal Tender of Gender*, *supra* note 41 at 143; Annette R Appell, “Disposable Mothers, Deployable Children (book review)” (2003-2004) 9 *Mich J of Race & L* 421; Mosoff, *supra* note 80.

juvenile delinquent regime in Nova Scotia and was dominated by denominational institutions. However, within these religious institutions were psychiatrists and social workers who were changing the discourse of child protection work based upon their insights in this growing field. It is evident from the juvenile court reports at this time that the juvenile court judges which administered child protection laws were heavily influenced by this growing medicalization of notions of the best interests of children. By understanding the ways in which the insights of psychiatry have through history informed the content of objective legal notions of harm to children, the best interests of children, and even family autonomy, we gain insight into the social regulation of children and mothers in poverty.

Social theorists inspired by the work of Michel Foucault have attempted to understand the operations of power while at the same time shifting an analytic focus away from the role of the state. In looking to the involvement of non-state actors in the processes of power, these theorists have examined the role of psychiatrists and psychiatric knowledge in maintaining social order through the regulation of persons and populations. Nikolas Rose, for example, has written extensively on the role of psychiatry in the techniques of liberal government; government understood in the Foucauldian sense of the “forms of thought and action that seek to conduct the conduct of others.”<sup>85</sup> Rose writes that,

Psychiatry has, since the 19<sup>th</sup> century at least, been intrinsically bound to problematics of government. Indeed the birth of psychiatry as a ‘know how’ of conduct in the 19<sup>th</sup> century was part of a fundamental shift in our experience of ourselves in ‘the west’: the individuality and vitality of the human being became an object for positive knowledge; authority acquired to the obligation to act upon the conduct of human individuals in the light of positive knowledge; positive knowledges of what it was to be human began to shape the ethical regimes according to which individuals came to understand, judge and act upon themselves. Psychiatry, from this perspective, is intrinsically bound to the

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<sup>85</sup> Nikolas Rose, “Psychiatry as a Political Science: Advanced Liberalism and the Administration of Risk” (1996) 9.2 *History of the Human Sciences* 1 at 3.

changing ways in which human beings have tried to govern themselves – not just to changing ideas or models of human nature, but to the changing ethical field within which such understandings of what it is to be human are linked to vocabularies and systems of judgement about conduct and to techniques for acting upon it to improve it.<sup>86</sup>

But the role of psychiatry in governing the conduct of people and populations is not static and Rose identifies four distinct periods in history in which psychiatry has acted in distinct ways to “propose new technologies for the regulation of conduct”.<sup>87</sup> These periods are important for understanding psychiatry’s contributions and correspondence to overall shifts in political government as well as for understanding its role in moral regulation. Rose’s periodizations assist in understanding how psychiatric and psychological regulation is dependent upon establishing a grid for the normal and abnormal that can often map onto moral or ethical shifts over time.

Rose’s periodization for the administrative role of psychiatry begins with psychiatry in the asylum of the 19<sup>th</sup> century. In this era of the asylum, Rose explains that psychiatry was bound up with Victorian philanthropic projects including “the transformation of subjects into citizens who would regulate their own conduct according to norms of prudence, order, temperance, continence, responsibility and so forth.”<sup>88</sup> By observing, classifying and working upon the “mad” in the asylum, psychiatrists began to develop a classification of normal/abnormal which was capable of diagnosing and then therapeutically engaging with the subject. Cure was understood in terms of “when the mad person was restored to the status of free citizen” and capable of acting in concert with norms of civility.<sup>89</sup>

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<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid* at 6.

<sup>89</sup> *Ibid.*

From this early age of psychiatry in the asylum, Rose writes that psychiatry and psychology began to leave the walls of the asylum and work upon the population in the search for “degeneracy”.<sup>90</sup> It is in this era where we see persons that threatened social order identified and worked upon by various means including eugenics, hygienic movements, segregation, etc. In this era we see psychiatry working upon larger social problems in “bio-medical” terms. Rose singles out “syphilitics, imbeciles, paupers, criminals, gamblers, idiots, drunkards, vagrants, the mad, the unemployable, the tubercular” who were targeted by this psychiatric intervention in the name of social order.<sup>91</sup> Rose indicates that juvenile delinquency was a part of this period of targeting degeneracy.

In Rose’s third periodization beginning in the 1920s and 30s – the era of ‘mental hygiene’ – he writes that a new “social vocation’ for psychiatry was born, one where psychiatric expertise claimed a role in relation to the management of social ineptitude and inefficiency in all social institutions.”<sup>92</sup> The role of psychiatry in this era was much more wide ranging than merely focusing on those labelled “mad” or “abnormal”. In this era psychiatry entered the fora of the school, army or factory and set out techniques for the prevention and treatment of poor mental hygiene. The home in particular became a focus, as a nexus of relationships affecting the mental hygiene of the child. In this era, Rose explains that

Social workers became case-workers, with a new role in linking up the home, the school, the court and the clinic, the playground and the street around the focus of the individual case; the person with his or her biography and family was now to be the object of documentation and professional supervision. A new normalizing scrutiny and evaluation spread into the school, the army, the factory and elsewhere.<sup>93</sup>

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<sup>90</sup> *Ibid* at 8.

<sup>91</sup> *Ibid*.

<sup>92</sup> *Ibid* at 10.

<sup>93</sup> *Ibid* at 11.

Finally, Rose situates the political role of psychiatry within the frame of advanced liberalism at the end of the 20<sup>th</sup> century. Following the work of Robert Castel,<sup>94</sup> Rose has written that psychiatry at the end of the century saw a shift from the language of dangerousness to the language of risk.<sup>95</sup> Rose posits that, “The language of risk is indicative of a shift towards a logic in which the possibility of incurring misfortune or loss in the future is neither to be left to fate, nor to be managed by a providential state.”<sup>96</sup> Risk management becomes the new buzzword for both individuals and authorities. Individuals and families are taught to bring future consequences into the present and to manage the risks that confront them through calculation and assessment.

Rose writes that the techniques of psychiatry take on such prominence in advanced liberal thinking as psychiatry – as a field which claimed to be able to “identify difficulties of conduct”<sup>97</sup> – informs governments which problems had to be governed and how. Psychiatry, then, provides the knowledge for the population as a whole to self-manage, not just for the classical psychiatric patient. The individual who acts against her own self-interest is singled-out as risky, as a psychiatric subject which must be controlled and managed through the “administrative function of expertise.”<sup>98</sup> Rose writes that, “Failures of management of the self, lack of skills of coping with family, with work, with money, with housing, are now all, potentially, criteria for qualification as a psychiatric subject.”<sup>99</sup> In this

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<sup>94</sup> See Robert Castel, “From Dangerousness to Risk” in Graham Burchell, Colin Gordon and Peter Miller, eds, *The Foucault Effect: Studies in Governmentality*, (Chicago: University of Chicago Press, 1991).

<sup>95</sup> Rose “Psychiatry as a Political Science”, *supra* note 85 at 13.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid* at 4.

<sup>98</sup> *Ibid* at 17.

<sup>99</sup> *Ibid* at 15.



way we see a shift from socialized responsibility in the mental hygiene era to personal responsibility in advanced liberalism.

Rose's periodizations and observations on the role of psychiatry are important to understanding the emergence and significance of distinct periodizations of child protection law and practice in Nova Scotia, although they do not map on exactly. To begin with, Rose's periodization of asylum psychiatry is instructive for understanding the emergence of cruelty to children in the Victorian era. However, the asylum remained an important part of child protection practice in Nova Scotia until well after the post-war years, when Rose indicates that the mental hygiene movement would have been well underway. Therefore, when applied to the case of Nova Scotia, Rose's periodizations – especially asylum and degeneracy – overlap.

Furthermore, because of Nova Scotia's long reliance on institutions, Rose's mental hygiene era emerges much later in Nova Scotia than Rose's periodization. Preventive casework in the home, for example, did not become a prominent part of child protection practice until the mid-to-late 1950s in Nova Scotia. Finally, as I will argue, the elements of advanced liberal administration of risk did not come into prominence in Nova Scotia until the late-1980s and 1990s. Regardless of these small inconsistencies, Rose's overall periodizations and shifts in psychiatry have provided an important framework for the project and for understanding how the influence of psychiatry on child protection informed the various transformations in the concept of harm to children and best interests.

Rose's Foucauldian-influenced analysis of the role of psychiatry in regulating the conduct of persons is important for understanding how ostensibly "non-political" or non-state actors can end up exerting a great amount of influence over the government of individuals. In particular, his work helps to illuminate how reliance on the determinations of psychiatry by law in fact implicates law in the moral regulation of populations with

reference to the ostensibly neutral category of the normal.<sup>100</sup> In the era of juvenile delinquency, for example, child protection work became focused not on the criminal acts of children or their parents but on the types of children before the court. As opposed to looking at the transgression committed by the delinquent that resulted in a child being brought before the court, juvenile court judges began to expound on the moral deficiencies in the child's constitution and upbringing that had brought him before the court.

As work with juvenile delinquents in the institutions became more scientific with the hiring of psychiatrists and became less explicitly moral, drawing upon more objective determinations of normality, judges affirmed the diagnosis of children as "feebleminded", for example, and ordered their confinement in reformatories. The actual work of the reformatories continued to impose this grid of normalization on children, classifying children with respect to their distance to the norm and gearing their training towards that classification. What this neutral, scientific, medico-legal determination of harm and best

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<sup>100</sup> In Rose's work, the history of psychiatry is presented in order to understand how the subjectivity of the citizen is produced in part by psychiatric knowledge. Psychiatry assists then in maintaining a liberal social order as people conduct themselves in accordance with liberal values of freedom and autonomy and not as a result of coercion by an external force such as the state. For example, Rose argues that government of the conduct of individuals through the family is accomplished not by repressive means:

If the family came to serve social objectives, it was not in spite of the wishes of women and men, but because it came to work as a private, voluntary and responsible agency for the rearing and moralising of children and promoting their physical and mental welfare. Domestic, conjugal and parental conduct is increasingly regulated not by obedience compelled by threat of sanction but through the activation of individual guilt, personal anxiety and private disappointment. Husbands and wives, mothers and fathers themselves regulate their feelings, desires, wishes and emotions and think themselves through the potent images of parenthood, sexual pleasure and quality of life. In the necessary gap between expectation and realisation, between desires and satisfaction, anxiety and disappointment fuel the search for expert assistance. It is this pleasure/anxiety relation that drives the government of personal life; it is this which is both installed by the tutelage of expertise and which provides it with its voluntary relation to its subjects. These kinds of mechanisms, not those of social control, domination and subordination, link up the private family with social, economic and political objectives through the maximisation of consumption, the promotion of subjectivities and the construction of social solidarity through the rituals of personal life.

Nikolas Rose, "Beyond the Public/Private Divide: Law, Power and the Family" (1987) 14 J of Law and Soc 61 at 73.

interests served to obfuscate, however, was the raced, gendered and ableist assumptions that were drawn upon in psychiatric and legal determinations of delinquency and best interests. In this era we see the normal child as an expression of the white, middle class, able-bodied Christian child. In this era we also see the opening of asylums such as the Nova Scotia Home for Colored Children and the Shubenacadie Indian Residential School which worked upon racialized children in the name of the best interests of this abstract “normal” concept of the child. Therefore, in understanding how non-state actors such as psychiatrists and social workers exert a great deal of influence in governing persons, activities that were depicted as “private” or “natural” or “objective” are de-naturalized and their “public” and political character revealed.

Rose’s explication of the history of psychiatry is presented in order to understand how the subjectivity of the citizen is produced in part by psychiatric knowledge. In this way, Rose attempts to understand how psychiatry in shaping subjectivity leads people to govern themselves, thereby maintaining social order. Psychiatry assists in aligning this conduct with the liberal values of freedom and autonomy as social order is maintained not by the hand of a repressive state, but rather, by people conducting themselves in accordance with these normalized notions of freedom and autonomy. For example, in his explication of the role of psychiatry in the early years of the asylum, Rose writes, “The asylum became one of the vast machines of morality invented in the 19<sup>th</sup> century, whose rationale was the production of citizens who could be free to the extent that they had taken the obligations of moral, prudent and self-responsible conduct into themselves.”<sup>101</sup> The focus of Rose’s work and the work of other Foucauldian social theorists, therefore, is on the construction of subjectivity and on the way that power works, not repressively, but through the production of subjectivity – of the way people understand themselves.

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<sup>101</sup> Rose, “Psychiatry as a Political Science”, *supra* note 85 at 7.

Furthermore, because power operates through the notion of freedom and autonomy in this way, for Foucauldian social theorists there is little normative force in liberal notions of “freedom” or “autonomy”.

In this thesis, however, I am focused on how law and social policy govern the conduct of marginalized families. As such, I have not “de-centered” the role of the state although I recognize the importance of the disciplinary regime. Furthermore, while I agree that the promotion of certain subjectivities is relevant to understanding the regulation of families in poverty, we must also understand how these subjectivities inform the relationship between the individual, the family and the state. In a neoliberal age persons in poverty are subject to repressive forms of regulation in their failure to live up to the enterprising, independent individual. This regulation justifies the reduction of government support for social services and reduced eligibility for individuals, as well as the policing of the lives of marginalized families through criminal and quasi-criminal laws.<sup>102</sup> What’s more, gender, race, ability and class intersect to further marginalize the positions and lives of those who are positioned at these intersections.<sup>103</sup> As Joan Sangster has argued with reference to her historical study on the criminalization of the conduct of girls and women in the Ontario, focusing too much on the discursive aspect of moral

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<sup>102</sup> Dorothy Chunn and Shelley Gavigan, “Welfare Law, Welfare Fraud, and the Moral Regulation of the ‘Never Deserving’ Poor” (2004) 13(2) *Social & Legal Studies* 219.

<sup>103</sup> Smith, *supra* note 50 at 72:

Although it is certainly true that neoliberalism singles out the poor for some of the harshest forms of regulation, capital and its allies the State, the caring professions and the social science academy, do not treat the poor as a homogenous mass. On the contrary, these institutions are deeply committed to racially inspired and gender segregated interventions into the intimate lives of the poor that operate along multiple axes at the same time.

regulation in turn obfuscates the operations of the state and the reality that some populations “experienced a more *repressive* version of regulation”<sup>104</sup>.

Finally, while I attempt to understand the moral regulation of socio-economically marginalized families and children, this is in order to gain greater understanding of a certain mode of legal regulation. As Fudge and Cossman have pointed out in their work on the interaction of law, privatization and feminism: “Law is an important site for the production of discourses that play a powerful role in shaping human consciousness and behaviour. At the same time, its coercive force distinguishes it from other discourses.”<sup>105</sup> For marginalized women and families that do not fit prevailing social norms, the child protection system steps in and legitimizes the most coercive of interventions: removal of the child from the home. In this project I have heeded the warning of critical feminist socio-legal theorists, Gavigan and Chunn on the need to understand the coercive effects of legal and moral regulation on the lives of women and children in poverty. They write:

In our view, the concept has analytic utility as long as we continue to attend to the location of moral regulation in social policy and forms of law and state, and maintain an emphasis on the contradictions, social antagonisms and class relations in a given social formation. The hard lives of poor women and their children impel us to resist any form of analysis that is also not attentive to the jagged edges of coercive laws that condemn them to the new ranks of the never deserving poor.<sup>106</sup>

So what potential is there for law to challenge the interaction of coercive social and legal regulation? In Foucault’s own understanding of the interaction between law and the disciplinary regime, he argued that eventually law began to act more and more according to the standards of normalcy developed by the psychiatrists, as opposed to assertions of

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<sup>104</sup> Joan Sangster, *Regulating Girls and Women: Sexuality, Family, and the Law in Ontario, 1920-1960* (Oxford: Oxford University Press, 2001) at 3.

<sup>105</sup> Cossman and Fudge, *supra* note 41 at 5.

<sup>106</sup> Gavigan and Chunn, “Welfare Law, Welfare Fraud”, *supra* note 102 at 237.

right of traditional liberal legalism.<sup>107</sup> Some scholars have referred to his as the “expulsion” thesis, arguing that Foucault saw the disciplinary complex and the influence of the norm eventually expelling the juridical form of law.<sup>108</sup> Rather than adhering to this notion of the expulsion of law, however, I have found the work of Ben Golder and Peter Fitzpatrick illuminating on the interaction between law and psychiatric power and on the ability of legal concepts to serve as a critique of disciplinary power.

Golder and Fitzpatrick argue that rather than expelling law, there is a necessary relationship between law and disciplinary power and that in fact, psychiatric power is “constitutively dependent upon law”.<sup>109</sup> Disciplinary power is dependent upon law first, to support its making of a knowledge claim about the abnormal subject, and second, to assist it in responding to the recalcitrant subject.<sup>110</sup> While law is seen to act on the edges of disciplinary power, as a frame restraining its excesses, its failure to adjudicate on the truthfulness of disciplinary knowledge in fact gives the core of this power the appearance of coherence. Golder and Fitzpatrick explain:

[B]y purporting to exercise its supervisory jurisdiction only over the more egregious aberrations, abuses and excesses of disciplinary power, law confirms the basic claim at the heart of disciplinary power to adjudicate on questions of normality and social cohesion. In so doing, it inscribes the disciplinary project in the very nature of things, ‘confirming’ its tenuous grasp on a scientifically

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<sup>107</sup> Michel Foucault, *The History of Sexuality, Volume 1: An Introduction* (New York: Random House, 1978) at 144. Foucault wrote of the law in the normalizing society:

I do not mean to say that law fades into the background or that the institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and that the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative and so on) whose functions are for the most part regulatory. A normalizing society is the historical outcome of a technology of power centered on life.

<sup>108</sup> Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994).

<sup>109</sup> Ben Golder and Peter Fitzpatrick, *Foucault’s Law* (London: Routledge, 2009) at 61.

<sup>110</sup> *Ibid.*

comprehended and disciplinarily administered world and simply acting to correct its application to those cases where something goes amiss.<sup>111</sup>

Where law pulls back its authority and refuses to supervise, it is affirming that the knowledge claims made by disciplinary power are “in the nature of things”, or in other words, are just simply claims to truth.<sup>112</sup> However, Golder and Fitzpatrick point out that “the mere factuality of the scientific fails adequately to deal with instances of utter recalcitrance” and so disciplinary power relies upon law not only for its truth claims, but to assist in enforcing its authority over the recalcitrant subject.<sup>113</sup>

Golder and Fitzpatrick go a step further. While showing that disciplinary power does not expel law (and therefore that a critical evaluation of law is important and relevant) they then go on to explore how Foucault’s notion of power can be fruitfully applied to understanding law as itself a source of power. They therefore present a Foucauldian theory of law that Foucault himself did not adhere to but which is nevertheless consistent with and informed by his theoretical work.

Golder and Fitzpatrick assert that there are two dimensions or “modalities” to law: one that is more static and determinative, that is “on the side” of the norm. And the other aspect of law is the law that is always in “constitutive engagement” with that which resists it.<sup>114</sup> It is this second aspect of law which allows us to see law as a responsive and engaged source of power, responding not just to the truth claims of psychiatry, for example, but to demands of right brought before the law. Or, to respond to some of Foucault’s feminist socio-legal critics, this responsive law does not just reinforce patriarchal power, for

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<sup>111</sup> *Ibid* at 64.

<sup>112</sup> *Ibid* at 66.

<sup>113</sup> *Ibid* at 67.

<sup>114</sup> *Ibid* at 71.

example, but also responds to feminist challenges within law. Golder and Fitzpatrick write of the “responsive” dimension of law that,

[L]aw must necessarily assume a labile existence, and this is what we have been calling the responsiveness of Foucault’s law. Whilst law must assume a definite content – and this content is given to law in standard jurisprudential perceptions by such entities as a sovereign, a class, a society and so forth – the law cannot remain tied to any given content and must incorporatively engage with what is other to it, with resistances and transgressions which challenge its position.<sup>115</sup>

Therefore, the same flexibility that allows law to respond to and accommodate itself to the normalizing discourse of disciplinary power allows law to respond to that which is outside of this power.

Taking into account the character of law’s constitutive engagement with disciplinary power allows us to understand how law may respond to the recalcitrant subject by repressive means and how psychiatry in turn serves to render this repressive regulation to be in the best interests of “abnormal” persons. But Golder and Fitzpatrick’s notion of the responsive side of law is important as it also allows us to see the potential for challenging this regulation. In her work on the child welfare system, Hester Lessard, for example, has problematized the concepts of family privacy and autonomy in the context of the child protection law as a flexible legal concept capable of providing for either a supportive or coercive engagement with families. In particular, she shows how, over time, this flexibility comes into view and allows us to critically evaluate the content of this malleable liberal language:

The malleable liberal language of respect for the integrity and autonomy of the family, in an earlier era, was more resonant with social democratic values. It signaled support rather than the right to be left alone. Recently, however, liberal values of respect for family have provided the rhetorical justification for a family privacy rather than family support approach to the issue of responsibility for child rearing. A glance back at the history of child welfare regimes reveals the tension and overlay of these two different meanings-family support and family privacy-of state intervention in families.<sup>116</sup>

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<sup>115</sup> *Ibid* at 77.

<sup>116</sup> Lessard, “Empire of the Lone Mother”, *supra* note 45 at 725.



Subjecting the malleable liberal language of family autonomy to historical critique provides us with a critical perspective on the values, interests and beliefs that make up the concept. Understanding how law may pull back from scrutinizing disciplinary power which is at the heart of so many determinations of harm, risk of harm and the best interests of children helps us to de-naturalize these concepts and understand their potentially political character. On the other hand, understanding the responsiveness of law provides us with a means to imagine a critical feminist concept of family autonomy which may provide greater justice for families and children in the child protection system.

### **Developing a Feminist Legal Account of Family Autonomy**

Feminist legal theorists have thoroughly critiqued the liberal notion of privacy and liberal legalism's maximizing of this notion of freedom by imposing a strict divide between the public and private spheres.<sup>117</sup> Liberal legalism protects the right to freedom by patrolling the boundary at which public intervention is warranted and justified in the private sphere. Some feminist legal scholars, however, have argued that the construction of the private sphere supports classed, raced and gendered oppression. With respect to the oppression of women, feminists have argued:

[P]rivileging 'privacy' or the 'right to be left alone' has, historically, been bad for those who lack the means or opportunities to exercise much meaningful choice over the course of their lives. Thus women's traditional confinement in the 'private' sphere has been widely recognized as socially oppressive and personally damaging.<sup>118</sup>

Furthermore, feminist legal theorists such as Catherine MacKinnon have shown how law's insistence on a private sphere has served to reinforce patriarchal oppression:

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<sup>117</sup> *Supra* note 43.

<sup>118</sup> Emily Jackson and Shelley Day Sclater, "Introduction: Autonomy and Private Life" in Shelley Day Sclater et al, eds, *Regulating Autonomy: Sex, Reproduction and Family* (Oxford: Hart Publishing, 2009) at 2.

Women in everyday life have no privacy in private. In private, women are objects of male subjectivity and male power. The private is that place where men can do whatever they want because women reside there. The consent that supposedly demarcates this private surrounds women and follows us everywhere we go. Men reside in public, where laws against harm exist – real harm, harm to men and whoever has the privilege to be hurt like men – and follow them wherever they go. ...As a legal doctrine, privacy has become the affirmative triumph of the state's abdication of women. Sanctified by the absolution of law, the private is the everyday domain of women in captivity, abandoned to their isolation and told that is what freedom really means.<sup>119</sup>

In this way notions of privacy or freedom in the private sphere are not natural, but political categories, capable of justifying unchecked relations of power. For example, the family regulated by the common law was structured by rules of marriage, property ownership, inheritance, and guardianship which placed the husband as the sole source of legitimate authority within the private sphere of the home. Besides the maintenance of these legal rules, the state rarely intervened in any substantive way to challenge his authority. While this sphere was depicted as a natural sphere free of regulation, in effect, the private sphere of the common law family was thoroughly regulated by legal and social rules setting in place a patriarchal order. In particular, feminists have shown how the central liberal concepts of autonomy, liberty and privacy have been constructed so as to support the strict liberal adherence to the public/private divide. The concept of autonomy, they argue, reinforces the liberal individual concept of “man” as an atomistic as opposed to embedded social being. In contrast, feminist theorists have shown how we are constituted in our relationships with others.<sup>120</sup>

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<sup>119</sup> Catharine A MacKinnon, “Reflections on Law in the Everyday Life of Women” in Austin Sarat and Thomas R Kearns, eds, *Law in Everyday Life* (Ann Arbor: University of Michigan Press, 1993) at 117-118.

<sup>120</sup> Jennifer Nedelsky, “Reconceiving Autonomy: Sources, Thoughts and Possibilities” (1989) 7 *Yale JL & Fem* 7; Catriona Mackenzie and Natalie Stoljar, eds, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford: Oxford University Press, 2000); Jocelyn Downie and Jennifer Llewellyn, *Being Relational: Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2012).

But the drawing of a private sphere around the liberal family not only serves to naturalize power relations within that sphere, but a strict liberal insistence on the division of the public and private spheres has served to justify a lack of public responsibility for the “private” sphere. In recent decades feminist legal theorists have critiqued and reconceived of the central liberal concepts of independence, self-sufficiency, autonomy, privacy and liberty in order to challenge the effects of the privatization of social benefits on the lives of women and children. Feminist legal theorist Martha Albertson Fineman writes that, “Perhaps the most important task for those concerned with the welfare of poor mothers and their children, as well as other vulnerable members of society, is the articulation of a theory of collective responsibility for dependency.”<sup>121</sup> As such, she critiques the liberal interpretation of the concepts of independence, autonomy and self-sufficiency for its assumption that responsibility for dependency is relegated to the private sphere of the family.

Fineman writes that behind the valorized liberal concepts of independence, autonomy and self-sufficiency lies the “assumed family”:

The assumed family is a specific ideological construct with a particular population and a gendered form that allows us to privatize individual dependency and pretend it is not a public problem. Furthermore, the gendered nature of this assumed family is essential to the maintenance and continuance of our foundational myths of individual independence, autonomy and self-sufficiency. This assumed family also masks the dependency of society and all its public institutions on the uncompensated and unrecognized dependency work assigned to caretakers within the private family.<sup>122</sup>

She articulates instead a critical feminist notion of autonomy that socializes responsibility for caretaking work on the basis that dependency is not an aberrant state but, “unavoidable

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<sup>121</sup> Martha Albertson Fineman, “Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency” (1999) 8.1 *Am Uni J of Gender, Soc Pol’y & L* 13 at 16.

<sup>122</sup> *Ibid* at 14.

and inevitable; it is developmental and biological in nature.”<sup>123</sup> Recognizing that dependency or vulnerability are not a choice but an inevitable state that we as members of a society have all, and will all be in, grounds Fineman’s claim for seeing caretaking as a social debt or collective responsibility rather than the private responsibility of families.<sup>124</sup> Therefore, in recognizing the collective responsibility for family autonomy Fineman conceives of independence not as freedom from state intervention per se, but freedom from coercive state intervention, with a corresponding right to supportive state intervention. She writes:

My version of the new entity privacy, designed to complement the new family, could be called “autonomy.” Autonomy in this sense would protect entity decision making, giving the unit the space and authority to self-govern, and including the right of self-definition. Autonomy does not presuppose that the family would be separate from society. The family would be anchored firmly within society, and subsidized and supported by market and state, but would retain authority within its parameters. Privacy, just like subsidy, should attach to units performing societally necessary and essential functions, such as caretaking.<sup>125</sup>

She argues that independence and autonomy should be reconceived such that autonomy is “gained when an individual has the basic resources that enable her or him to act consistent with the tasks and expectations imposed by society.”<sup>126</sup> Rather than eschewing independence, Fineman argues that “This form of independence should be

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<sup>123</sup> Martha Albertson Fineman, “The 2010 Randolph W. Thrower Symposium: The New Deal: From De-Regulation to Re-Regulation: The Vulnerable Subject and the Responsive State” (2010) 60 *Emory LJ* 251 at 263.

<sup>124</sup> In Fineman’s more recent work she uses the concept of vulnerability rather than dependency to ground the claim to collective responsibility for caretaking work. Her use of the concept of human vulnerability rather than dependency, she argues, captures the notion that “vulnerability arises from our embodiment, which carries with it the imminent or ever-present possibility of harm, injury and misfortune.” *Ibid* at 267.

<sup>125</sup> Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: WW Norton, 2004) at 303.

<sup>126</sup> “Cracking the Foundational Myths”, *supra* note 121 at 25-26.

every citizen's birthright, but independence in this sense can only be achieved when individual choices are relatively unconstrained."<sup>127</sup>

Fineman's demand for a sphere of familial independence, however, is not the traditional sphere of privacy for the married heterosexual couple which has reproduced gendered and sexualized subordination. She argues for a reconceived sphere of privacy around the caretaker-dependent relationship which demands collective responsibility for this relationship. The caretaker-dependent relationship is provided the capacity to self-determine in the form of material supports from the state and supportive state policies, as well as the right to demand a certain sphere of non-intervention. She writes:

[W]e can and should rethink privacy in such a way as to confer autonomy on caretaking or dependency units. The beneficiary of this privacy is the unit, defined through its functioning, not its form. In fact, the caretaking unit could adopt a multitude of possible forms. The unifying idea that creates the "new family" is the significance of the caretaker-dependent relationship.

Autonomy, my candidate for defining the "new" privacy to complement the new family, would protect entity decision-making, giving the unit the "right" to self-government. It would do so not in the sense that the new family privacy would separate it from society; rather, the family would be anchored firmly within society, subsidized, and supported by market and state, but retaining authority within its parameters.<sup>128</sup>

As opposed to figuring a sphere of privacy around the husband/wife, a sphere that feminist theorists such as MacKinnon have characterized as the place where "women are objects of male subjectivity and male power" Fineman argues for conceiving of family privacy around the caretaker-dependent unit. "Properly conceived," she argues, "privacy as a principle of self-government allows the caretaker-dependent unit to flourish, supported and subsidized by the larger society without the imposition of conformity."<sup>129</sup>

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<sup>127</sup> *Ibid.*

<sup>128</sup> Martha Albertson Fineman, "Symposium: Privacy and the Family: Panel III What Place for Family Privacy?" (1999) 67 *Geo Wash LR* 1207 at 1221.

<sup>129</sup> Fineman, *The Autonomy Myth*, *supra* note 125 at 307.

By naturalizing the “dependent” or “vulnerable” half of the independence-dependence dichotomy, the power of Fineman’s critique lies in her ability to de-naturalize independence and to unmask the uncompensated and unrecognized work in the family that must maintain this exceptional state of independence. This critique is illuminating for the central concepts of child protection law as they assist us in seeing the ways in which the concept of family privacy has obscured who actually takes responsibility for dependency. In this way, she first demands that we see the reliance of some families on outside support and subsidy as inevitable; not deviant. And second, she unmasks the political dimension of family privacy which burdens mothers with dependency and vulnerability, not simply because of the active “choice” of those mothers, but because the liberal narrative of independence and self-sufficiency demands that they take on these obligations. Mothers that seek support in order to live up to the obligations placed upon them by the state and society are viewed as entitled to this support as of right, rather than as dependant and pathological.<sup>130</sup>

In drawing a sphere of privacy and autonomy around the mother-child relationship, however, Fineman’s theory has faced challenge not only from those who see her formulation of family autonomy as raising the specter of social control, but from children’s rights advocates. Child rights advocates question how the private sphere may be used to justify caretaker power over the child in the same way that women through history have been the objects of male power in the private sphere. These advocates rightly worry about the consequences this will have for addressing abuse to children.<sup>131</sup>

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<sup>130</sup> For a discussion of the depicting of mothers on assistance as dependent and pathological see “A Genealogy of Dependency”, *supra* note 81 at 309.

<sup>131</sup> Barbara Bennett Woodhouse, “Symposium: Privacy and the Family: Panel III, The Dark Side of Family Privacy” (1999) 67 *Geo Wash LR* 1247. In *The Autonomy Myth*, *supra* note 125 at 302, Fineman responds to Woodhouse in the following manner:

While Fineman argues that “privacy should never condone abuse”<sup>132</sup> I hope that this thesis will show that for families in poverty, constructions of what constitutes abuse and who constitutes an abuser are deeply engrained in the way the private sphere has been regulated by law and society. Legal definitions of harm to, and the best interests of, children have themselves served to reproduce inequality and at certain points in history justified the residual support of mothers and their children. In this thesis I will show that in particular, certain mother-headed families – families for whom Fineman wishes to provide a supportive sphere of family autonomy – have been targeted and marginalized by the social and legal regulation of harms to children. In order to provide a just concept of family autonomy for marginalized families we must be attuned to the ways that the social and legal regulation of harms to children has, through history, served to reproduce gendered, raced, ableist and classed inequality.

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Woodhouse reaches for more than mere control over parents. With the objective of children’s welfare as the organizing tool, she advocates for a more extensive sense of children’s rights – “needs-based rights.” These rights are not associated with children’s rights to autonomy or independence, but are the basis for a positive claim for basic nurture and protection. These rights create responsibility, not only for individual parents, but also for the larger community, and require political responses.

To some extent, Woodhouse’s concern with basic-needs rights reflects my own call for collective responsibility for dependency. However, the identity of the rights holder and the source of the right are different in important ways. My claim is a communal one – entity focused and based on a claim of entitlement or right originating as a result of the societal work performed by caretakers. Woodhouse’s model is not a compensatory one, but is based on the status of the child as a future citizen. She positions the child as the claim holder and, in doing so, conceptually breaks up the family into individual and therefore potentially competing interests. This paves the way for claims of collective supervision and monitoring of parental stewardship.

<sup>132</sup> “What Place for Family Privacy?” supra note 128 at 1207 at 1219; *The Autonomy Myth*, *ibid* at 300-301. Fineman writes:

A more central criticism of privacy, from the perspective of this postscript, is presented by those who focus on the rights of children. Family privacy in this regard protects parental authority and autonomy. In this area, the tendency of privacy critics who see abuses has been to individualize the family, by separating children out for special concern and state protection. Some child advocates focus on physical and psychological abuse of children within families. These seem to me to be easy issues (problems of definition aside). Privacy should never be used to condone or obscure abuse.

In this thesis I will argue that a critical feminist concept of family autonomy for child protection law and jurisprudence must be capable of questioning the need for, and the nature of, state intervention into the family that is attendant to the ways that the public/private divide may be obscuring relationships of power which are ultimately harmful to the family and the child. I argue that a critical legal concept of family autonomy must be attendant to the ways that ostensibly private agents reproduce political power in setting out what constitutes harm to the child and the child's best interests. In protecting a robust presumption of family autonomy for marginalized families and children, the law must also be attendant to the ways in which a focus on the limits of the right to a private sphere can distract from questions about the quality of public responsibility for children and families.

But, as Fineman argues, a feminist concept of family autonomy must not sacrifice the family's right to refuse the interventions of both state and non-state actors in the decisions affecting the care and custody of their children. In this thesis I will show how at points in the history of child protection the state has assumed almost total responsibility for the child, and that this total responsibility and lack of a robust notion of family autonomy came with its own dangers for children. In particular, we are now learning of the abuses that resulted from a lack of family autonomy for Aboriginal and African-Nova Scotian families caught up in the child protection regimes in Nova Scotia.<sup>133</sup> Racist, patriarchal, ableist and classed depictions of children and parents as uncivilized, feeble-minded, dependant and incompetent served to presume the beneficence of the state care

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<sup>133</sup> Truth and Reconciliation Commission of Canada, *The Survivors Speak: A Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015), online: TRC Canada <[http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Survivors\\_Speak\\_2015\\_05\\_30\\_web\\_o.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Survivors_Speak_2015_05_30_web_o.pdf)>; in June 2015 the Government of Nova Scotia announced a Restorative Inquiry into the Nova Scotia Home for Colored Children, online: Restorative Inquiry <<http://restorativeinquiry.ca/restorative-inquiry>>.



of these children. As the testimonials of the survivors of the Nova Scotia Home for Colored Children and the Shubenacadie Indian Residential School reveal, the lack of a critical concept of family autonomy for marginalized families had devastating effects not just for parents, but for children and their communities.

In this thesis I present a critical feminist history of child protection law in Nova Scotia in order to understand how the changing concepts of harm and best interests upon which child protection decisions are based may be undermining important supports for families and children in poverty. The legislating and adjudicating of concepts of harm to children which set the limits of family autonomy for socio-economically marginalized families, must be attendant to the social, legal, economic and political disadvantages faced by that family and at the same time come to terms with the way that ostensibly apolitical knowledge about those harms can serve to further disadvantage the child and the family. The best interests of children from marginalized families likewise demand that courts contextualize the needs and interests of the child in the social, economic, and political context in which the child finds herself. Without subjecting notions of harm and best interests to critical analysis, child protection law and jurisprudence will end up reproducing the same processes of raced, gendered, ableist and classed subordination that rendered the child in poverty vulnerable in the first place.

## Chapter 2:

### 19<sup>th</sup> Century Nova Scotia: The Breakdown of the Victorian Family and the Emergence of Cruelty to Children as a Legal Problem

Our laws... have in one instance made a wise provision for breeding up the rising generation; since the poor and laborious part of the community, when past the stage of nurture, are taken out of the hands of their parents, by the statutes for apprenticing poor children, and are placed out by the public in such a manner, as may render their abilities, in their several stations, of the greatest advantage to the commonwealth. The rich indeed are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family.<sup>134</sup>

Today we take for granted that the state has a mandate to intervene in families and remove children from harm – but such intervention is premised on a modern notion of the state and indeed, a modern notion of the family. Before the emergence of child savers and cruelty to children legislation, the Victorian concept of the family saw the welfare of children and wives as completely facilitated either within the private sphere of the family or totally within the public sphere by poor relief. It was the job of husbands and fathers to provide for the financial welfare of children and the role of mothers to provide for their personal wellbeing. If the father could not provide for the family the family went on poor relief and became the responsibility of the taxpayers, or the overseers of the poor. The family taken care of in the public sphere lost all sense of privacy or autonomy. As will be discussed, should the poor family apply for poor relief in the counties its members could be sold at auction to the lowest bidder for their “settlement” or if in Halifax, could be made to live together in the Poor House or workhouse.<sup>135</sup>

Cruelty to children legislation and consequently, the treatment of cruelty to children as a legal problem emerged at the end of the 19<sup>th</sup> century amid a climate of reform

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<sup>134</sup> Sir William Blackstone, *Commentaries on the Laws of England*, Book 1, chapter 16.

<sup>135</sup> Senior Scribes of Nova Scotia, *Poverty, Poor Houses and Private Philanthropy* (Halifax: Communications Nova Scotia, 1996) at 15-19.

– reform of the poor law, reform of family law, and reforms for greater rights and protections for women, children, and disabled persons. Cruelty to children as a legal problem was not just a product of the changing way in which society thought about the position of children. Towards the end of the 19<sup>th</sup> century, growing industrialization and urbanization, and out-migration exerted a great amount of pressure upon the Victorian family in Nova Scotia. The Victorian family maintained by the common law – with the husband as the sole source of legal and public authority in the family – was no longer capable of addressing the social, economic and political problems faced by its members.

The end of the 19<sup>th</sup> century saw new roles for women and children in an emerging industrial capitalist society. These new roles and positions required a rethinking by law of their positions under the common law. By the end of the 19<sup>th</sup> century there was a proliferation of legislation reordering the private relationships within the common law family. The husband was no longer the sole legal personality of the family, nor were children the sole property of the father. Wives and children became distinct legal personalities and the state began to intervene to assert women’s rights to separate property,<sup>136</sup> and their rights to custody of their children on the basis of the welfare of the child.<sup>137</sup> However, the family law reforms introduced at the end of the 19<sup>th</sup> century did not provide the same formal legal protections for women in families in poverty.

In this chapter I will provide an overview of the legal, social and political changes that accompanied both family law and poor law reforms informing the emergence of cruelty to children as a legal problem. The focus of much of the analysis will be centered on reform in the city of Halifax as the city was the center of much philanthropic work at

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<sup>136</sup> *Of the Property of Married Women*, RSNS 1884 (5<sup>th</sup> Ser) c 94.

<sup>137</sup> *Custody of Infants Act*, SNS 1893, c 11.

the time. It is noteworthy that the poor law regimes in the counties and the city in 18<sup>th</sup> and 19<sup>th</sup> century Nova Scotia differed in that the counties provided for “outdoor relief” but since 1759, Halifax provided only “indoor relief”, or relief in the Poor House.<sup>138</sup> Furthermore, the Society for the Prevention of Cruelty which introduced and enforced the *Prevention and Punishment of Wrongs to Children Act*,<sup>139</sup> was situated in Halifax.

In this chapter I will show how family law reforms such as the introduction of the *Prevention and Punishment of Wrongs to Children Act* would have affected families in poverty primarily. Many of the harms which constituted “wrongs to children,” both in the *Prevention and Punishment of Wrongs to Children Act* and in other “domestic relations” legislation passed at the time, included harms that captured much of the activity of the poor: truancy, street hawking, and working in “unsavoury” places, to name a few. Not only were these activities harmful to the image of childhood as a sphere of dependence and innocence as conceived by the Victorians, but these wrongs to the child were also harmful to the social order. The criminalization of this activity (which may also have supplemented the earnings of poor households) as wrongs to children for which removal of the child from parental care and custody was legally justifiable, served to add a new dimension to the content of the common law rules regarding custody.<sup>140</sup> As far as parents in poverty were concerned, their legal rights to retain care and custody of their children would be

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<sup>138</sup> Stan Fitzner, *The Development of Social Welfare in Nova Scotia: A History* (Halifax: Department of Public Welfare, 1967) at 9.

<sup>139</sup> SNS 1882, c 95.

<sup>140</sup> Pursuant to the common law, the father was responsible for the education, protection and maintenance of the child, but the common law did not set out in a substantive way what the content of child caring looked like for the patriarchal family. *Commentaries on the Laws of England*, Book 1, chapter 16.

predicated not just upon their ability to remain off poor relief,<sup>141</sup> but on their ability to keep the child free from “circumstances exposing him or her to lead an idle or dissolute life.”<sup>142</sup>

The legal treatment of wrongs to children was consonant not just with the larger family law reforms that saw women and children emerging as more distinct legal persons, but the introduction of the *Prevention and Punishment of Wrongs to Children Act* was also consonant with *Poor Law* reforms at the time. In particular, children of the poor were increasingly positioned as the deserving poor on which philanthropic activity should be focused and parents who failed to provide for these children were deemed to be the source of the problem.<sup>143</sup> While family law reforms that took place for economically self-sufficient families arguably improved the formal legal position of women in the family – although, as some have argued, from conservative and protectionist impulse<sup>144</sup> – the legal position of women in poverty was not improved by these family law reforms aimed at the poor. Women in poverty, like women in propertied families, still had to navigate largely unchecked patriarchy in the home,<sup>145</sup> a social, economic and political system which prevented them from earning money in either the mainstream marketplace, or in

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<sup>141</sup> The intersection of the laws of poor relief and apprenticeships at the time provided that the children of families on poor relief lost the ability to direct the care and custody of their children and instead, the overseers of the poor would apprentice out the children. *Of Masters, Apprentices and Servants*, SNS 1858, c 125.

<sup>142</sup> *Prevention and Punishment of Wrongs to Children Act*, s 3.

<sup>143</sup> Patricia T Rooke and RL Schnell, *Discarding the Asylum: From Child Rescue to the Welfare State in English Canada (1800-1950)* (Lanham, MD: University Press of America, 1983); Andrew Jones and Leonard Rutman, *In the Children's Aid: J.J. Kelso and Child Welfare in Ontario* (Toronto: University of Toronto Press, 1981).

<sup>144</sup> Philip Girard & Rebecca Veinott, “Married Women’s Property Law in Nova Scotia: 1850-1910” in Janet Guildford and Suzanne Morton eds, *Separate Spheres: Women’s Worlds in the 19<sup>th</sup> Century Maritimes* (Fredericton: Acadiensis Press, 1994).

<sup>145</sup> See for example, Reva B Siegel, “The Rule of Love’: Wife Beating as Prerogative and Privacy” (1996) 105 Yale LJ 2117.

“immoral” jobs such as prostitution,<sup>146</sup> and now, women in poverty risked legally-sanctioned intrusions from philanthropists such as the child savers who could remove their children from the home indefinitely.

While the historical record shows that women did advocate for themselves and were able to use the interventions of philanthropists such as the Society to empower themselves and their children in certain ways,<sup>147</sup> this era exemplifies the precarious position of women in poverty at the intersection of legalized public/private divide. Greater liberalization of the family resulted in the institution of a more defined private sphere for families in poverty, setting out due process rights<sup>148</sup> and legislated wrongs that would justify depriving the parent of care and custody of the child.<sup>149</sup> At the same time, however, the private rights affirmed the content of private – as opposed to public – responsibilities. The family was the proper place for the support and proper socialization of children. But the family – and more specifically, the mother – who could not support the child financially and in accordance with a moralized notions of proper child caring at the time, was also positioned legally, as well as socially, as the source of the problem. For women in poverty without access to superior courts to protect rights to custody of their children, and indeed, without the wages and property to facilitate their own private support, this era of family law reforms was less an era of legal rights than of legalized responsibilities.

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<sup>146</sup> Judith Fingard, *The Dark Side of Life in Victorian Halifax* (Porters Lake: Pottersfield Press, 1989) at 95.

<sup>147</sup> *Ibid* at 171.

<sup>148</sup> *Adoption Act*, SNS 1893, c 9, s 2 and 3 provided that the child of a single mother, and importantly, an unwed mother could not be adopted without the mother’s consent unless certain conditions were met. A discussion in provided below.

<sup>149</sup> *Prevention and Punishment of Wrongs to Children Act*, s 3.

## The Legal Regime of the Victorian Family

The Victorian family, with its emphasis on the male as the head of the household, as sole breadwinner and sole legal and political person, was very much a product of the workings – and conspicuous absence in some areas – of the common law. The Victorian family was premised upon ideas of marital unity with a woman immediately losing her right to legal personhood upon marriage. Pursuant to the common law doctrine of coverture, when a woman married a man her right to hold, acquire and dispose of property in her own name was lost.<sup>150</sup> The doctrine of marital unity held that at law, a husband and wife are seen as one person. As explained by the jurist Sir William Blackstone in his *Commentaries on the Laws of England*: “the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything.”<sup>151</sup>

The consequences of coverture were far reaching for married women: a married woman could not hold, acquire or dispose of property in her own name, nor could she keep her own wages, acquire or satisfy debts, or enter into contracts on her own unless they were to acquire goods and services for the household. This meant that women were unable to work for wages outside the home without their husbands’ consent, nor were they able to conduct business in their own name.<sup>152</sup> Married women were not able to bring legal proceedings in their own name and conversely were not able to be sued in contract or tort in their own name, but had to be joined with their husbands.<sup>153</sup> Furthermore, women were

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<sup>150</sup> Liliias M Toward, *Development of Matrimonial Property Law in England and Nova Scotia: An Historic Perspective* (Halifax: Law Reform Advisory Commission, 1975) at 3.

<sup>151</sup> *Commentaries on the Laws of England*, Book 1, chapter 15.

<sup>152</sup> Toward, *supra* note 150 at 3.

<sup>153</sup> See *Married Women’s Property Act, 1884*.

not able to have a domicile that was different from their husbands. Therefore, if a man left the province and his wife refused to leave with him, her refusal to leave would constitute legal desertion.<sup>154</sup>

The common law also provided that the father was the sole guardian of the children, with all legal authority over those children.<sup>155</sup> Blackstone wrote that the father's power over the child was "sufficient to keep [the child] in order and obedience" whereas the mother did not have power over the children, but rather was entitled only to their "reverence and respect."<sup>156</sup> The father of the legitimate child was given virtually absolute custody of the child, save for the rare case where the courts of equity would intervene to correct a father who failed to sufficiently support or educate the child "in a manner forbidden by the laws of the state."<sup>157</sup> So absolute was the father's rights to his children as against the mother's that the father could, in his will, appoint a guardian of the child other than the mother, and his wishes would be upheld by the courts against her protests.<sup>158</sup> The law provided that the legitimate father of the child was the man married to the woman who bore the child. As one writer explains, while this might not accurately represent the biological reality of fatherhood, "the law has historically been more committed to

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<sup>154</sup> Philip Girard & Rebecca Veinott, *supra* note 144 at 72.

<sup>155</sup> See for example, *De Manneville v De Manneville*, (1804) 10 Ves 52; *R v Greenhill*, (1836 4 A & E 624.

<sup>156</sup> Constance Backhouse, "Shifting Patterns in Nineteenth Century Canadian Custody Law" in David H Flaherty, ed, *Essays in the History of Canadian Law* (Toronto: Osgoode Society, 1981) 212 at 215.

<sup>157</sup> *Ibid*, 215-16.

<sup>158</sup> Rebecca Veinott, "Child Custody and Divorce: A Nova Scotia Study, 1866 to 1910" in P Girard and J Phillips, eds, *Essays in the History of Canadian Law* (Toronto: University of Toronto Press 2011) 273 at 275.



protecting the traditional patriarchal family than to accurately representing biological fact.”<sup>159</sup>

During his lifetime, the father was the absolute sole economic head of the household. Not only did coverture provide that the wife could not hold property in her own right but the father’s dominion over the household extended to the right to take the property of his children. As one Nova Scotia historian has explained:

In both the rural and urban preindustrial economies children were crucial to household production, and during the transition to industrialism their wages were important to the maintenance of the family. The father exercised absolute control over the children and their earning power; he was entitled to the earnings of his children, and he was empowered to bind them out as apprentices.<sup>160</sup>

The legal relationship between father and children was predicated largely, although not exclusively, on the notion of property. The father owed his children obligations of maintenance, protection and education.<sup>161</sup> The obligation of protection as described by Blackstone did not necessarily entail that the child should be protected *from* the father – although extreme cruelty at equity could abrogate the father’s guardianship of the child<sup>162</sup> – but rather that the father protect the child from others. Blackstone wrote, “A parent may also justify an assault and battery [and even homicide itself, in the necessary] defense of the persons of his children.”<sup>163</sup> With respect to the laws of maintenance, fathers were obliged to maintain their infant and “impotent” children.<sup>164</sup> However, the father’s duty of

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<sup>159</sup> Fiona Kelly, “Producing Paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family” (2009) 21.2 Can J of Women and the L 315 at 316.

<sup>160</sup> Veinott, *supra* note 158 at 275.

<sup>161</sup> Blackstone, *Commentaries*, Book 1, chapter 16.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

education to the child was also significant and was described by Blackstone as being of the “greatest importance of any.” In his *Commentaries* he explains:

[I]t is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child, by bringing him into the world; if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself. Yet the municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children. Perhaps they thought it punishment enough to leave the parent, who neglects the instruction of his family, to labor under those griefs and inconveniences, which his family, so uninstructed, will be sure to bring on him. Our laws, though their defects in this particular cannot be denied, have in one instance made a wise provision for breeding up the rising generation; since the poor and laborious part of the community, when past the stage of nurture, are taken out of the hands of their parents, by the statutes for apprenticing poor children, and are placed out by the public in such a manner, as may render their abilities, in their several stations, of the greatest advantage to the commonwealth. The rich indeed are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family.<sup>165</sup>

The father’s right of guardianship over the child at common law, then, conferred on him not only private obligations as between him and his children, but obligations to society to ensure that they did not become “useless”. As Blackstone notes, however, aside from the provisions of the *Poor Law* providing for the apprenticeship of poor children, there was no statutory duty to do so or statutory means of abrogating the father’s right to guardianship of his legitimate child in order to enforce this obligation.

In return for these duties owed to children, the father was given the right to his child’s labour and profits from the child’s estate until the child turned 21 and the child was obliged to obey his father.<sup>166</sup> The property relationship, therefore, was very much at the center of Victorian family law.<sup>167</sup> Phillip Girard and Rebecca Veinott remind us, however, that the common law patriarchal family also had positive effects for the financial position

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<sup>165</sup> Blackstone, *Commentaries*, Book 1, chapter 16.

<sup>166</sup> *Of Masters, Apprentices and Servants*, SNS 1858, c 125.

<sup>167</sup> Constance Backhouse, “Child Custody” in *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women’s Press, 1991) at 201.

of women. While men retained all economic authority outside the family, they also had responsibilities within the family, in the form of dower, for example, or the obligation to provide for necessities for the family.<sup>168</sup> The common law family was conceived of not just as the right of the family, but as an economic unit which provided for all of its members.<sup>169</sup> It is when it failed to provide economically for its members – for example, in cases of desertion and the failure to provide necessities – that the courts would step in and remedy the situation.<sup>170</sup>

A review of the laws of domestic relations from the statutes of Nova Scotia in the mid-19<sup>th</sup> century reveals a concern only for the solemnization of marriage and the guardianship and apprenticeship of children and servants. The whole of domestic relations legislation in mid-19<sup>th</sup> century Nova Scotia was comprised of the following Acts: *Of Marriage and the Solemnization Thereof*,<sup>171</sup> *Of the Registry of Births, Marriages, and Deaths*,<sup>172</sup> *Of Guardians and Wards*,<sup>173</sup> and *Of Masters, Apprentices and Servants*.<sup>174</sup>

The laws of custody and apprenticeship were largely concerned with a father's right to dispose of the custody of his child and to appoint a guardian, or with the father's right to apprentice his child. The mother was only entitled to bind her child as apprentice where the father of the legitimated child was either dead or incompetent.<sup>175</sup> Included under the

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<sup>168</sup> Girard & Veinott, *supra* note 144 at 69.

<sup>169</sup> *Ibid.*

<sup>170</sup> If, for example, the mother could be shown to be without blame, ie., not to have herself deserted the husband by taking a different domicile, or committed adultery.

<sup>171</sup> SNS 1858, c 122.

<sup>172</sup> SNS 1858, c 123

<sup>173</sup> SNS 1858, c 124.

<sup>174</sup> SNS 1858, c 125.

<sup>175</sup> *Ibid.*, s 2.

laws of domestic relations in the law *Of Masters, Apprentices and Servants* were provisions not only for parents or guardians to bind their children to apprenticeship but also to lodge complaints against their children's masters, and conversely, for the masters to lay complaints against their servants or apprentices. Therefore, the sphere of domestic relations was very much a sphere concerned largely with property and maintenance. Other than allowing for the common law rules as to coverture and custody, legislated interventions into the private sphere of the family were concerned only with setting out the rules for solemnization of marriage and with the guardianship and apprenticeship of children and servants. Not only the common law, but Nova Scotia's legislation, provided for a largely unregulated sphere of husbandly and paternal authority in the private sphere of the family. Neither the state nor judiciary intervened to curtail this patriarchal authority in any meaningful way as long as the father was adhering to narrow obligations to maintain, protect and educate his dependents.<sup>176</sup>

This sphere of non-intervention into the patriarchal Victorian family meant a patriarchal privacy and rule over the family as far as the state was concerned.<sup>177</sup> Men were absolutely entitled to their wives' sexual fidelity, and indeed, records from the mid-18<sup>th</sup> century reveal that most often men would receive judicial divorces on the grounds of their

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<sup>176</sup> Backhouse, "Child Custody", *supra* note 167 at 201:

Theoretically there were some limits on a father's rights to his children. For centuries judges had the authority under rules of equity to seize custody from a father where he had behaved so outrageously that a child's security was endangered. But the extreme caution with which most courts exercised this power had left paternal custody rights almost unchallenged. As one Manitoba justice, Thomas Wardlaw Taylor, noted in 1893, "the Court is always unwilling to interfere with the common law rights of the father."

<sup>177</sup> Girard and Veinott argue for example, that "We must not forget the considerable influence of wide networks of kinship, community and religion in encouraging socially responsible behaviour. Twentieth-century conceptions of the family as a primary zone of privacy must be set aside when we turn to the largely rural society of 19<sup>th</sup> century Nova Scotia." See Girard & Veinott, *supra* note 144 at 69.

wives' adultery.<sup>178</sup> Furthermore, men were entitled to dispose of their wives' and children's bodies to the point of physical endangerment.<sup>179</sup> Physical, sexual and psychological violence were rarely considered sufficient legal ground for state intervention into the private sphere of the patriarchal family. Chastisement or the use of force to socialize children and women to obedience in the household was thought of as a necessary part of bringing up children and a part of the father's duty of education.<sup>180</sup> Cruelty, such as that that would justify violating paternal authority over the family, required that "the victim suffer physical illness or mental distress such as seriously to impair bodily health or to endanger life."<sup>181</sup> Even where violence reached a level where it would be considered cruelty, especially in middle class families, this was not something to be addressed criminally by the police.<sup>182</sup>

Despite the social blindness towards cruelty, women would seek legal redress for cruelty within the family in the form of divorce. However, while Nova Scotia was the first province to institute judicial divorce in legislation as early as 1758<sup>183</sup> – even before divorce

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<sup>178</sup> Kimberly Smith Maynard, "Divorce in Nova Scotia, 1750-1890" in P Girard and J Phillips eds, *Essays in the History of Canadian Law* (Toronto: University of Toronto Press 2011) 232 at 253.

<sup>179</sup> James G Snell, "Marital Cruelty: Women and the Nova Scotia Divorce Court, 1900-1939" (1988) XVIII.1 *Acadiensis* 3.

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid* at 8; Maynard, *supra* note 178 at 253.

<sup>182</sup> Judith Fingard "The Prevention of Cruelty, Marriage Breakdown and the Rights of Wives in Nova Scotia 1880 – 1900" XXII.2 (1993) *Acadiensis* 84 at 87.

<sup>183</sup> Constance Backhouse, "Pure Patriarchy: Nineteenth-Century Canadian Marriage" (1985-1986) McGill LJ 264 at 267. *An Act Concerning Marriage, and Divorce, and for Punishing Incest and Adultery, and Declaring Polygamy to be a Felony*, SNS 32 Geo 2 (1758), c 17.

became legal in England<sup>184</sup> – and while cruelty became a ground for divorce in 1761,<sup>185</sup> it was strictly construed. As Kimberley Smith Maynard points out in her study of divorce in Nova Scotia between 1750 and 1890, an “extreme degree of physical violence [was] required to establish cruelty in the eyes of the law.”<sup>186</sup> An 1873 divorce case reproduced by Maynard indicates the degree of cruelty that was required even into the late-19<sup>th</sup> century to constitute cruelty:

The legislature never could have intended that the relationship of husband and wife...should be severed, unless for causes of the gravest character; and where the intervention of this Court is invoked on the ground of cruelty of a husband, it is bound...to have it clearly established here that the cruelty complained of has been so aggravated as to render it impossible that the Duties of the married life could be discharged, and the complaining party must make it appear not only that she has not brought her troubles on herself by provocation or other misconduct, but that she has exhausted all means in her power by her conciliatory conduct to render a more kindly feeling in her husband toward her...It is the duty of the court to keep the rule extremely strict.<sup>187</sup>

Maynard notes that in her study of marital cruelty between the mid-18<sup>th</sup> to the mid-19<sup>th</sup> century she found: “a general judicial insensitivity to domestic violence, and a tendency on the judge’s part to respond to factors other than violence itself” such as intemperance and failure to support.<sup>188</sup> She indicates that such an insensitivity was evidence in the criminal law, as well, and that of seventeen husbands brought before the stipendiary magistrate in Halifax in the 1860s for threats, only two were fined.<sup>189</sup> Men

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<sup>184</sup> *Ibid* at 273. *An Act to Amend the Law Relating to Divorce and Matrimonial Causes in England*, 1857 (UK), 20 & 21 Vict, c 85.

<sup>185</sup> *An Act for the Amendment of an Act, Entitled an Act Concerning Marriages and Divorce, and for Punishing Incest and Adultery, and Declaring Polygamy to be a Felony*, SNS 1 Geo3 (1761), c 7.

<sup>186</sup> Maynard, *supra* note 178 at 250.

<sup>187</sup> *Ibid* at 252.

<sup>188</sup> *Ibid* at 250.

<sup>189</sup> *Ibid*.

accused of cruelty could argue successfully that their wives had provoked them and this would serve as a defense.<sup>190</sup>

The consequences of the father and husband retaining almost absolute authority over the common law family meant not only that problems within the family were private problems, subject to his discretion, but conversely, that without the father there was no private sphere of the family. The unmarried, or otherwise single mother and child were not sufficient legal personalities to demand legal autonomy as a family and the single mother could not be accorded full rights to custody of the child without court order. The common law provided that the child born to an unwed mother was an “illegitimate,” and a child of nobody: *filius nullius*. Blackstone wrote of the illegitimate child: “the incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body.”<sup>191</sup> Furthermore, the social and economic reality of the time would have meant that unwed and other single mothers would in many cases have been unable or would have experienced great financial difficulty attempting to support a child on their own.<sup>192</sup>

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<sup>190</sup> *Ibid.*

<sup>191</sup> Blackstone, *Commentaries*, Book 1, chapter 16; Lori Chambers, “Newborn Adoption: Birth Mothers, Genetic Fathers, and Reproductive Autonomy” (Fall 2010) 26.2 Can J of Fam L 339 at 347-48.

<sup>192</sup> Suzanne Morton, “Women on Their Own: Single Mothers in Working Class Halifax in the 1920s” (Spring 1992) 21 *Acadiensis* 90 at 91:

The death or departure of a spouse affected men and women alike, regardless of class, but had a particularly devastating economic and emotional impact on working-class women. Society defined the ideal family as a male-headed household supported by a male wage, but families led by women that did not fit this model constituted a significant proportion of households. Most women-led households were headed by widows, but women who were deserted, separated or married to migrant workers also composed important groups of those left temporarily or permanently in charge. Women who found themselves temporary or permanent heads of households were economically and socially vulnerable.

The social stigma against single motherhood alone, would have made single-motherhood a difficult proposition for many women in 19<sup>th</sup> century Nova Scotia.<sup>193</sup> Furthermore, the unwed and otherwise single mother had *de facto* responsibility for the child.<sup>194</sup> Pursuant to the common law, rights of care and custody of the legitimate child belonged to the father. Single mothers without orders for custody would have had tenuous legal rights to the care and custody of their children. Furthermore, before the passage of adoption legislation in Nova Scotia in 1896, the consent of the unwed mother was not required in order for a third person to seek guardianship of the child. The single mother and her illegitimate child especially were accorded no inviolable space of family privacy without a male head. Indeed, the other name by which the illegitimate child was known at law was *filius populi*: child of the people – the child of the public, as opposed to private sphere of the family.<sup>195</sup>

The fact that mother-headed families were accorded no family autonomy under law was also significant to the obligations of the putative father of the illegitimate child. While the common law provided in the intact family that a father owed his children maintenance, protection and education, nowhere did legislation set out these responsibilities. The father of an illegitimate child, however, was obliged by the state and by the *Maintenance of Bastard Children Act*<sup>196</sup> – a subset of poor relief legislation – to maintain the bastard child. Nova Scotia's *Maintenance of Bastard Children Act* of the mid-19<sup>th</sup> century provided that any single woman who became pregnant with a child that was likely to become chargeable

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<sup>193</sup> See, for example, Linda Gordon, "Single Mothers and Child Neglect, 1880-1920" (1985) 37 *Am Quart* 173.

<sup>194</sup> Chambers, *supra* note 191 at 347.

<sup>195</sup> *Ibid.*

<sup>196</sup> SNS 1851, c 91.



– that is, to become a financial charge upon the township where the mother resided - must lay an information before a county judge to swear to the identity of the putative father of the child before the birth of the child.<sup>197</sup> The father would then be brought before a judge and made to swear a bond with surety to indemnify the township for maintenance of the child. The overseers of the poor could then, after the birth of the child, bring an application to have both parents brought before the court and have the father indemnify the township against the costs of maintenance for the child and the cost of the birth of the child.<sup>198</sup> At this time, the father could argue that he was not the father of the child, and, if, despite his protests he is found by the county judge to be the father of the child, the Act provided for methods of appeal from the orders of filiation.<sup>199</sup>

It is important to note that the *Maintenance of Bastards Act* worked as part of the overall legislation of poor relief in the province. While the mother could bring the initial application for maintenance, she was essentially an inconsequential party, relevant only to the extent that she could identify the putative father. The real interested parties were the father and the township upon which the child and the mother were chargeable. Nova Scotia's *Poor Law*<sup>200</sup> of mid-19<sup>th</sup> century was a reception of the Elizabethan *Poor Law* which had been in operation in England since 1601.<sup>201</sup> Nova Scotia's *Poor Law* divided the province into "poor districts" in which the ratepayers of each district were taxed in order to provide for the poor. Each "pauper" or person in poverty who could not maintain themselves, was determined to have a "settlement" in any one poor district. Rules of

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<sup>197</sup> *Ibid*, s 1.

<sup>198</sup> *Ibid*, ss 2-3.

<sup>199</sup> *Ibid*, ss 7-8.

<sup>200</sup> *Of the Settlement and Support of the Poor*, SNS 1851, c 89.

<sup>201</sup> 43 Eliz 1, c 2.

settlement were based upon where the person was born or where they had lived for a significant period of time.<sup>202</sup> Overseers of the poor in each poor district would collect dues from rate payers and maintain the paupers of the district. Paupers who did not have settlement in a particular poor district who applied for relief could be removed back to the poor district where they had settlement.<sup>203</sup> The *Maintenance of Bastard Children Act* then, was key for reimbursing each poor district for the illegitimate children it was obliged by the *Poor Law* to maintain.

It was not only unwed -mother-headed families, however, that came within the purview of the *Poor Law* of mid-19<sup>th</sup> century Nova Scotian society. Any married father who could not keep the family off poor relief would not be able to take full advantage of his usual paternal rights pursuant to the common law, or domestic relations legislation of the time. For example, as described in the quote by Blackstone above, the father on poor relief lost this right to bind the minor child into apprenticeship and his entitlement to the wages of the child<sup>204</sup> and this right became that of the overseers of the poor. Section 6 of the *Poor Law* provided:

The overseers of the poor may bind as apprentices or servants, the minor children of any poor person, who has become chargeable to the district, as having a lawful settlement therein, or who is supported there in whole or in part at the charge of the district; and also all minor children, who are themselves chargeable to the district as having a lawful settlement therein, or as poor persons supported by the district.

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<sup>202</sup> *Of the Settlement and Support of the Poor*, s 3: Every poor person who is a native of a township or hath served an apprenticeship therein, or hath lived as an hired servant one whole year therein under an agreement to serve the same master one whole year then next before the application for relief, or hath executed a public annual office therein, or hath been assessed and hath paid his share of poor and county rates in the township during one year at one time, shall be entitled to a settlement, and such township shall be obliged to maintain him.

<sup>203</sup> *Ibid*, s 4.

<sup>204</sup> *Of Masters, Apprentices and Servants*, SNS 1858, c 125, s 1 and 5.

Further, it was the responsibility of the overseers of the poor to inquire into the treatment of these children by their masters, not the family.<sup>205</sup>

So closely associated was the Victorian family with property and maintenance, that while propertied families were accorded by law a sphere of family privacy – in the form of almost unfettered patriarchal power – the single-mother-headed and other poor families were ascribed no such privacy under the common law or laws of Nova Scotia in the mid-19<sup>th</sup> century. The laws regulating the poor family were very much a product of the *Poor Law*, whether they be single-mother-headed families or not. The courts and police would not intervene in the private sphere of the father-headed family unless his brutality was so overwhelming to require public condemnation.<sup>206</sup> However, the patriarchal discretion of the family on poor relief was limited by the powers of the overseers of the poor who would determine how much money the family would take in, where the family would live, and what was to become of the children of these families. In other words, where the propertied family was the private family, the un-propertied family or the mother-headed family could be understood as the public family – the family for whom the ratepayers of a poor district, or in other words, the “people” and the people’s fiscal and social concerns, were the ultimate authority.

### **Proliferation of Domestic Relations Legislation in Late 19<sup>th</sup> Century Nova Scotia**

These regimes of private and public domestic relations continued in Nova Scotia until the end of the 19<sup>th</sup> century when private “domestic relations” legislation and public welfare legislation went through substantial reform in response to a changing social,

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<sup>205</sup> *Ibid*, s 10.

<sup>206</sup> Backhouse, “Child Custody”, *supra* note 167 at 201.

economic and political landscape. Economic growth spurred on by rapid industrialization in North America meant that by the 1880s, Canada's cities were beginning to experience an era of relative wealth, which also contributed to the growing interest in social reform.<sup>207</sup> The creation of the Canadian Confederation in 1867, introduction of the National Policy in 1879 (ie., tariff protection for Canadian manufacturers), and completion of the Intercolonial Railway in 1876, ushered in an era of economic stimulation in Canada, as well as a growing acceptance of governmental intervention in the economy.<sup>208</sup> Unlike the rest of Canada, however, out-migration became a significant feature of the Maritimes towards the end of the 19<sup>th</sup> century.<sup>209</sup>

While the Maritime provinces had experienced prosperity and population growth during the first half of the 19<sup>th</sup> century, the second half of the century saw high levels of outmigration, urbanization, and economic decline as a result of rapid industrialization<sup>210</sup> and recession.<sup>211</sup> A drastic change in the traditional "wood, wind and sail economy" caused by the Industrial Revolution was contributing to a persistent stagnant economic growth at

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<sup>207</sup> Dennis Guest, *The Emergence of Social Security in Canada*, 2<sup>nd</sup> ed (Vancouver: University of British Columbia Press, 1985) at 19.

<sup>208</sup> Girard & Veinott, *supra* note 144 at 81.

<sup>209</sup> Patricia Thornton, "The Problem of Out-Migration from Atlantic Canada, 1871-1921: A New Look" (1985) 15 *Acadiensis* 3 at 10.

<sup>210</sup> *Ibid.*

<sup>211</sup> See David Sutherland, "Halifax 1815-1914: Colony to Colony" (1975) 1 *Urban History Review* 7 at 8-9. Sutherland explains:

The general international recession which set in during the early 1870s dealt Halifax a severe blow. Assessed property values, for example, had declined [from \$19.8 million in 1874] to \$14.5 million by 1881. Contraction of the tax base, combined with problems in collecting back taxes, almost bankrupted the city administration which, during prosperity, had increased its debt burden from circa \$95,000 in 1857 to \$1.2 million in 1872. The citizenry averted municipal financial collapse through reorganization and retrenchment but they had less success in generating long-term economic recovery. Recession turned into chronic stagnation.

the end of the century.<sup>212</sup> It is estimated that between the years 1861-1901, between 239,000 and 264,000 individuals emigrated from the Maritimes - mostly either to other provinces in Canada or to the United States.<sup>213</sup> As the overall population of the Maritimes in 1901 was only 893,953, this out-migration was substantial, indicating the level of economic insecurity at the time, as well as itself having significant effects on the economy, on society and on the family.<sup>214</sup>

The change in the economy from the age of “wood, wind and sail” to an industrialized one of “iron, coal and rail” was more keenly felt in the rural areas of Nova Scotia that had been dependant on lumbering, shipping, shipbuilding and fishing. By the 1880s, rural areas of Nova Scotia were experiencing significant levels of population decline, from -0.031 in Victoria to a population decline of -10.78% in Antigonish over a decade. By contrast, some thirty years before, these same areas had seen 10% population growth rates.<sup>215</sup> Urban centres or mining and steel areas such as Halifax, Cumberland and Cape Breton, were better able to adapt to the new economy and were able to stave off the worst of the out-migration, some of its increasing population coming from the province’s own rural areas. In the 1890s, for example, Cape Breton saw a population increase of 43.58% due to its steel industry, while Cumberland and Halifax managed to see population growth maintain at just above 4.5%. Even this small level of population growth, however, was significant, as in Nova Scotia’s rural areas by the very end of the 19<sup>th</sup> century, population decline was all but ubiquitous.<sup>216</sup>

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<sup>212</sup> Alan Brookes, “Out-Migration from the Maritime Provinces, 1860-1900” (1976) 5 *Acadiensis* 26 at 28.

<sup>213</sup> *Ibid* at 29.

<sup>214</sup> *Ibid*.

<sup>215</sup> Thornton, *supra* note 209 at 32.

<sup>216</sup> *Ibid*.

Outmigration and economic stagnation meant that the problems of “desertion” and “intemperance” were becoming more visible as children and wives were left in vulnerable economic positions. The existence of the common law doctrine of coverture meant that women left by their husbands without means of support were placed in an extremely vulnerable situation as the law provided them no ability to conduct business in their own name or to dispose of property to support themselves. In the most egregious cases, even where a woman was able to support herself and her children, the doctrine of coverture dictated that a deserting husband could return and take the wages that the wife had earned in his absence.

The problem of desertion and the failure to provide maintenance for wives had long been a problem in Nova Scotia. As Backhouse has explained:

In these [Maritime] provinces, the lure of travel combined with the perils of the sea to breed marital instability. Indeed, marriage breakdown seems to have been a concern of some magnitude in the Maritime Provinces, for they had also been the first to introduce legislation opening access to divorce.<sup>217</sup>

As mentioned above, Nova Scotia was the first province to institute judicial divorce legislation, as early as 1758 – even before divorce became legal in England. The original act providing for divorce allowed divorce on the grounds of impotence, kinship within prohibited degrees (ie., incest), adultery and wilful desertion while withholding necessary maintenance for a period of three years.<sup>218</sup> In 1761, the Act was amended in order to bring the legislation in line with the English counterpart. The new grounds for divorce were impotence, pre-contract and kinship within prohibited degrees, adultery and now, cruelty.<sup>219</sup> Case law from the mid-19<sup>th</sup> century reveals that the ground of cruelty was

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<sup>217</sup> Constance Backhouse, “Married Women’s Property Law in Nineteenth-Century Canada” (Fall 1988) 6.2 L and History R 211 at 217.

<sup>218</sup> *An Act Concerning Marriage and Divorce and for Finding Incest and Adultery and Declaring Polygamy a Felony*, SNS 32, Geo 2 (1758).

<sup>219</sup> Backhouse, “Pure Patriarchy”, *supra* note 183 at 268.

construed as a man having deserted his wife and failed to provide her maintenance.<sup>220</sup> Despite the availability of divorce, however, this was insufficient in the face of coverture to provide a modicum of economic protection for deserted wives. As Philip Girard points out, early married women's property bills introduced in the mid-19<sup>th</sup> century were introduced in an effort to protect women from alcoholic and deserting husbands.<sup>221</sup> Paternal responsibility within the family regulated by common law was no longer such a reliable source of support for the Victorian family regulated by common law.

The first Nova Scotian married women's property act was enacted in 1866.<sup>222</sup> The Act provided that where a married woman was deserted by her husband "without reasonable cause" and she was supporting herself, she could make an application to Supreme Court for an order providing for the protection of the property and earnings she acquired to support herself after her husband's desertion.<sup>223</sup> An order of protection had to be entered with the Registrar of Deeds. A woman's property would thereafter be protected from both her husband and his creditors and, if her husband or his creditors wrongfully detained her property, she could apply to court for restoration of the property plus a penalty worth double its value.

Furthermore, the 1866 Act provided that after the granting of an order of protection the wife would be deemed during her desertion to be in the same position with regard to "property and contracts and suing and being sued" as if she had been granted a

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<sup>220</sup> Maynard, *supra* note 178 at 237.

<sup>221</sup> Girard & Veinott, *supra* note 144.

<sup>222</sup> *An Act for the Protection of Married Women in Certain Cases*, SNS 1866, c 33.

<sup>223</sup> *Ibid*, s 2.

divorce.<sup>224</sup> The Act provided that a husband or his creditors could apply for a discharge of an order of protection for cause. While the legislation provided for separation of property, it did so only in very limited, emergency circumstances and only on application – not as of right. The necessity of a woman having to apply to Supreme Court for an order of protection meant that it was not readily available to the poor and middle class women it was meant to protect. Between 1866 and 1884 only six women applied for an order of protection.<sup>225</sup> It is significant to note, however, that for the most part these women were supporting themselves financially, whether by taking in boarders, keeping a “house of entertainment” or running a school for girls.<sup>226</sup>

In 1884, Nova Scotia’s Legislative Assembly introduced another piece of married women’s property legislation – the *Married Women’s Property Act, 1884* – which expanded upon the separate property rights provided to deserted married women in an 1866 Act.<sup>227</sup> This new act was modeled upon a similar act in Ontario and provided for a married woman to be able, as of right, to hold and enjoy her property “as if she continued sole and unmarried” regardless of whether or not she had been deserted by her husband. It can therefore be understood as a more liberally-minded act than the 1866 Act.<sup>228</sup> A woman’s property would be hers to hold and dispose of free from her husband and any obligations that he might have to creditors. The Act provided that a woman could insure her life, or with his consent, the life of her husband, that she could keep a separate bank accounts and that she had the right to make a will.

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<sup>224</sup> *Ibid*, s 5.

<sup>225</sup> Girard & Veinott, *supra* note 154 at 76.

<sup>226</sup> *Ibid*.

<sup>227</sup> *Of the Property of Married Women*, RSNS 1884 (5<sup>th</sup> Ser) c 94; Girard & Veinott, *ibid* at 75-76.

<sup>228</sup> But not if she committed adultery: see section 3.



However, a husband was still entitled to the earnings of his wife and children unless the husband had given his consent or the wife had obtained an order of protection disentitling him.<sup>229</sup> Nor could a woman carry on business on her own without an order or the consent of her husband. As well, a married woman could not be involved in a legal proceeding without being joined by her husband unless he was absent from the province. Therefore, while the 1884 legislation provided for greater separation as to property, it did not do away with all aspects of the common law doctrines of coverture and marital unity especially as they applied to women's ability to engage in paid work and conduct business without the consent of her husband. Furthermore, the Act provided that a woman would be wholly disentitled from the rights contained in the Act if it was found that she had committed adultery.<sup>230</sup> The common law doctrines of coverture and marital unity were finally overridden by legislation in Nova Scotia with the *Married Women's Property Act* of 1898.

Phillip Girard and Rebecca Veinott have argued that the 1866 Act emerged from a protectionist impulse – defending “virtuous deserted women from exploitative creditors and husbands.” Nevertheless, they argue that,

the idea that the state had a right and a duty to intervene to protect the economic interests of the weaker party within the family sphere represented a significant break with traditional notions of male authority within the family. The act of 1866 began to redefine the state's role as active intervener in the spousal relationship rather than passive conservator of marital right.<sup>231</sup>

Girard and Veinott write that the main impetus behind this protectionist attitude lay in the temperance ideas of the time which saw public and state sympathy for wives left destitute by alcoholic husbands. The writers note that similar sentiments were behind the

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<sup>229</sup> Section 37.

<sup>230</sup> Section 3.

<sup>231</sup> Girard & Veinott, *supra* note 144 at 77.

1884 legislation – that is a philosophy that “favoured a maternal/protectionist rather than a liberal approach to married women’s property”.<sup>232</sup> However, the Act was more liberal than its 1866 forebear. It provided women with liberal rights to contract and hold property as distinct legal individuals as opposed to the largely protectionist property rights accorded in the 1866 Act. Girard and Veinott speculate that the liberal attitude behind the act came from the “nascent female suffrage movement in the province.”<sup>233</sup> Interestingly, they write that during the 1884 session of the Legislature the *Bill to Allow Unmarried Women and Widows to Vote at Municipal Elections and Elections for School Trustees Act* was also debated.<sup>234</sup> In the end, Girard and Veinott argue that the introduction of the 1884 Act marked a compromise between liberal and conservative elements. While the Act had many liberal aspects providing for women to hold property, be responsible for debts and contract, it was not until the 1898 Act that they would see their rights to keep their wages and carry out business in their own names provided for.<sup>235</sup>

Married women’s property acts were followed by greater state intervention into the common law family with custody and adoption legislation<sup>236</sup> which altered the common law principle that fathers were automatically entitled to custody of their children. Providing for married women’s custody of children began with the 1866 amendments to the legislation providing for the Court for Divorce about the same time as early women’s property legislation.<sup>237</sup> Interestingly, these same 1866 amendments also provided for a

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<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid* at 82.

<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid* at 84.

<sup>236</sup> *Adoption Act*, SNS 1896, c 9.

<sup>237</sup> SNS 1866, c 13, s 9-10.

secured amount of annual alimony to be provided to women, indicating the protective nature of these amendments as far as the financial position of women and their children were concerned. However, while the 1866 amendments to the *Court of Divorce Act* provided for alimony, child maintenance and custody, the first reported case in Nova Scotia to actually see a woman awarded these by the court was not decided until 1882. The case, *Rachel Amelia Reid v. William Reid* saw the mother awarded custody of her two children, permanent alimony of \$150 per year and child support of \$100 per year until the children reached 21 years.<sup>238</sup>

It was not until the end of the 19<sup>th</sup> century that a woman could bring an application for custody of her child independent of an application for divorce begun in the Court of Divorce.<sup>239</sup> The passage of *An Act Respecting the Custody of Infants* in 1893 provided that a mother of a child could apply to the court for access or custody of the child.<sup>240</sup> Furthermore, the Act provided that the court may also make an order for maintenance of the child by the father.<sup>241</sup> It must be noted, however, that the Act merely supplemented the common law with regard to custody of the child. A father was still entitled to *de facto* custody of his legitimate child, whereas the mother of a legitimate child was entitled to

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<sup>238</sup> Veinott, *supra* note 158 at 279.

<sup>239</sup> In 1903 the legislature passed the *Alimony Act*, SNS 1903, c 64. The Act was comprised of one provision that stated:

1. The supreme court and any judge thereof shall have jurisdiction to grant alimony to any wife who would be entitled by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her by the law of England to a decree for restitution of conjugal rights; and alimony when granted shall continue until the further order of the court.

In 1904 the Act was amended by SNS 1904, c 35, s 1, providing that alimony was available to “any wife who is entitled to live apart from her husband by reason of his cruelty.”

<sup>240</sup> SNS 1893, c 11, s 1.

<sup>241</sup> *Ibid*, s 3.

now apply for custody and would only be provided custody of the child by court order. Importantly, the Act enshrined the principle that the welfare of the child was the paramount consideration in making a private custody award: Section 2 of the Act provided:

In making such an [access or custody] order the court or judge shall have regard to the welfare of such infant or infants, and to the conduct or circumstances of the parents, and to the wishes as well of the mother as of the father.

While domestic relations legislation was passed which began to construct the wife as a distinct legal individual, capable of contracting, holding property, and of having legal custody of her child, it is important that the state for the first time came to intervene to displace paternal custody of the child on the basis of a consideration of the child's welfare. Before this time, the father was wholly entitled to decide on the child's welfare except in the most egregious cases as long as it could be said that the father was not adequately maintaining or protecting the child.<sup>242</sup> Constance Backhouse, for example, writes on the significance of this state intervention in the family:

In part this new focus on the welfare of the child was a direct result of equalizing trends of mothers' and fathers' rights to custody. As maternal rights increased, paternal claims correspondingly diminished. A balancing was required to determine which parent deserved custody. As this balancing occurred, focus was necessarily directed to the welfare of the infant. The obvious extension of this reasoning was to award custody to the state or a charitable institution when the interests of the child so required. It may have been easier for courts to begin to intrude on parental rights when racial and class factors were operating. In any event this was a trend which would grow in the twentieth century.<sup>243</sup>

Therefore, along with the rise of women's rights within the propertied family, we see the rise of state intervention in the form of judicial scrutiny and legislative regulation into the sphere of the family. When a mother brought an application for judicial intervention, her rights to the child simultaneously came under scrutiny. She was not

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<sup>242</sup> Backhouse, *supra* note 156 at 215.

<sup>243</sup> *Ibid* at 241.

entitled to an order for custody if she had been found to have committed adultery<sup>244</sup> and likewise, if her fitness to have custody of the child was found wanting.<sup>245</sup>

Introduction of the welfare of the child principle in private custody cases opened up scrutiny of child custody by the courts as never before. Nonetheless, even though these Acts meant greater judicial and indeed, state intervention into the family, and scrutiny of a mother's fitness to take custody of her child, they also marked an advance in women's rights in mere decades. This increase in rights for women was consonant with other social and political movements in Nova Scotia at the time, including suffrage rights,<sup>246</sup> the aforementioned separate property rights and rights to contract, as well as greater participation of women in civil society in general. It must be noted, however, that, as feminist historians such as Backhouse have shown, while women won these hard earned rights at the legislatures, judges were often resistant to enforcing these new rights.<sup>247</sup>

But as Girard and Veinott point out there were also conservative currents in the province – such as the temperance and religious movements – which provided for state intervention into the family on the basis of protectionist, rather than liberal equality ideals. Feminist historians have written that even though the era saw progressive rights for

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<sup>244</sup> *Custody of Infants Act*, SNS 1893, c 11, s 4.

<sup>245</sup> *Ibid.*

<sup>246</sup> In Nova Scotia, unmarried and widowed women were given the right to vote first in 1887.

<sup>247</sup> Constance Backhouse, "Pure Patriarchy", *supra* note 183 at 291:

The judiciary, however, was far less inclined to endorse the egalitarian model of matrimony: nineteenth-century Canadian judges persistently favoured fathers in child custody decisions, despite successive statutes which sought to equalize parental rights over children. They were agonizingly slow to recognize the importance of a woman's role in child-rearing and they deliberately minimized the impact of legislation which diminished male authority over children. In a parallel vein, they promoted a hierarchical model of marriage in virtually every aspect of judicial decision-making. Their judgments in cases involving criminal conversation, alimony and wife-battering reveal, with few exceptions, an unhesitating advocacy of patriarchal marriage.

women, in many ways the reasoning behind the provision of greater rights to women was based upon a conservative “separate spheres” ideology.<sup>248</sup> For example, women were accorded custody of very young children in greater numbers under late-century child custody legislation in part because according to the separate spheres ideology women were held as the “natural” protectors of the home. In speaking to the Halifax YMCA in 1856, Reverend Robert Sedgewick summed up the mother’s inherent capacity for caregiving in these religious terms:

What is [the influence of] a mother? It is this relationship that [women’s] power for good is specially manifest, and specially blissful...It is not too bold a use of the figure to say that [a child] is in her hands as clay in the hands of the potter, that she can mould it at will. The power she can exert for a considerable period is well nigh absolute...The love of a mother is like the bounty of God...<sup>249</sup>

This early “maternalist” ideology saw the welfare of the child as best provided for by women, particularly where the children were young (under the age of 7).<sup>250</sup> The “tender years doctrine” was part of an overall ideology that saw a need to keep women and child in a purified, innocent sphere of the home, and to keep them from the vulgarities of the marketplace.<sup>251</sup> This separate spheres ideology was not confined to Nova Scotia but was fairly ubiquitous throughout Canada and the United States. As historian Ann Vandepol tells us of the U.S. situation:

As historians of the 19<sup>th</sup> century United States have pointed out, the celebrated “cult of true womanhood” divided humanity into socially distinct spheres of male and female, with women allotted the “natural” capacity to nurture, provide emotional care, and hence to parent. Because the parent-child relationship was reformulated

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<sup>248</sup> Janet Guildford and Suzanne Morton eds, “Introduction”, *Separate Spheres: Women’s Worlds in the 19<sup>th</sup> Century Maritimes* (Fredericton: Acadiensis Press, 1994) at 5.

<sup>249</sup> Backhouse, “Child Custody”, *supra* note 167 at 202.

<sup>250</sup> *Separate Spheres*, *supra* note 248 at 6.

<sup>251</sup> Backhouse, “Child Custody,” *supra* note 167 at 202. Backhouse argues that the Ontario 1887 Custody Act (as amended) which was very similar to the Custody Act introduced in Nova Scotia in 1893 was introduced in order to “nudge the judges into less pronounced preferences for paternal custody.”

as essentially affective and emotionally based, parenting became increasingly identified as an exclusively female responsibility. [citations omitted]<sup>252</sup>

Therefore, despite the increase in women's rights at the time, some have argued that the main concern with the proliferation of domestic legislation was the welfare of children, first and foremost rather than promoting the independence of women. As Backhouse explains:

In reality, however, it seems likely that it was the newly emerging concept of childhood and adolescence that improved women's custody rights. The basic and dominant impulse seemed to be not justice to women but the need to recognize and protect children and to prepare them for their forthcoming role in industrial society.<sup>253</sup>

Besides these new Acts providing for married women's property rights and custody of children, the end of the 19<sup>th</sup> century in Nova Scotia saw a proliferation of domestic relations reform. The intensely private, patriarchal common law family, in the span of several decades, became subject to a growing regime of legal regulation. Domestic relations legislation in Nova Scotia in the mid-19<sup>th</sup> century was comprised only of the Acts of *Marriage and the Solemnization Thereof*,<sup>254</sup> *Of the Registry of Births, Marriages, and Deaths*,<sup>255</sup> *Of Guardians and Wards*, and *Of Masters, Apprentices and Servants*. By the end of the century, a complex sphere of domestic relations begins to emerge which altered and extended the common law. In the revised statutes of 1900 the following Acts were listed under the "Domestic Relations" Title:

*Of the Solemnization of Marriage;*  
*Of the Property of Married Women;*  
*Of Conveyances of Real Property by Married Women;*  
*Of Dower;*

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<sup>252</sup> Ann Vandepol, "Dependent Children, Child Custody, and the Mothers' Pensions: The Transformation of State-Family Relations in the Early 20<sup>th</sup> Century" (Feb 1982) 29.3 Social Problems 221 at 227.

<sup>253</sup> Backhouse, "Shifting Patterns", *supra* note 156 at 213.

<sup>254</sup> SNS 1858, c 122.

<sup>255</sup> SNS 1858, c 123.

*Of Guardians and Wards;*  
*Of the Prevention and Punishment of Wrongs to Children;*  
*Of Apprenticeships;*  
*Of the Transfer of Immigrant and Orphaned Children;*  
*Of the Prevention of the Use of Tobacco and Opium by Minors;*  
*Of the Maintenance and Reform of Juvenile Offenders;*  
*Of the Custody of Infants;*  
*Of the Adoption of Children;*  
*Of the Licensing of Boarding houses for Infants Under Twelve Years of Age;*  
*Of the Closing of Shops and the Hours of Labour therein for Children and Young Persons;*  
*Of the Custody and Estates of Lunatics;*  
*Of the Guardianship and Care of Inebriates.*<sup>256</sup>

All of these acts were either introduced or reformed between 1893 and 1900 – an incredible proliferation of “domestic relations” legislation in a mere 7 years. A comparison of this list of new domestic relations legislation with the list of domestic relations legislation from mid-century reveals several obvious facts. First, besides laws relating to lunatics and inebriates – themselves also legal incompetents – most of this legislation was centered on the legal category of the child. And second, unlike domestic relations legislation in the mid-19<sup>th</sup> century Nova Scotia, married women appear as distinct legal personalities. What this tells us at first glance is that, as wives and children become distinct legal entities – their lives and relationships now regulated by law – the state actively intervened in and characterized as legal problems issues that had once been under the purview of the father in the patriarchal common law family. However, what may be less clear at first glance is the classed nature of these reforms.

As I will discuss in the next section, a bulk of this new domestic legislation was focused on addressing a number of emerging social and economic problems that largely only touched on the lives of the poor. Cruelty to children, the transfer of immigrant and orphaned children, use of tobacco and opium by minors, regulation of juvenile offenders and adoption, the licensing of boarding houses, and the closing of shops and hours of

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<sup>256</sup> Title XVII “Of Domestic Relations”, RSNs 1900, c 111 to c 126.



labour were, unlike the married women's property legislation and custody legislation, Acts that targeted mostly children and families in poverty. Furthermore, these new domestic relations acts targeted problems that used to be addressed using criminal, vagrancy and poor laws. Now, these problems: children's labour, crime, and drug use, for example, were regulated by law under the rubric of "domestic relations". In the next section I will detail how this new regime of domestic relations regulating the activity of children in poverty was consonant with social reform work taking place in Halifax at the time, as well as changing notions on providing relief to the poor.

### **Philanthropy, the New Child and the New Poor Law**

Nova Scotia's poor law of the mid-18<sup>th</sup> century – first enacted in 1763 – was a reception of the Elizabethan *Poor Law*<sup>257</sup>, which like its predecessor, saw responsibility for the poor administered by small townships or municipalities.<sup>258</sup> The law divided the province into "poor districts" in which the ratepayers of each district were taxed in order to provide for the poor and the poor relieved under the *Poor Law* were known as "paupers".<sup>259</sup> In 1770, an amendment established that the poor for which the district was responsible, had to have "settlement" there.<sup>260</sup> Rules of settlement were based upon where the person was born or where they had lived for a significant period of time. Paupers who did not have settlement in a particular poor district who applied for relief could be removed back to the poor district where they had settlement.<sup>261</sup> These laws of settlement were

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<sup>257</sup> 43 Eliz 1, c 2.

<sup>258</sup> Guest, *The Emergence of Social Security supra* note 207 at 11.

<sup>259</sup> Senior Scribes, *supra* note 135 at 15-17.

<sup>260</sup> Fitzner, *supra* note 138 at 7.

<sup>261</sup> *Ibid.*

important for preventing the movement of paupers from rural to urban areas. Furthermore, the *Poor Law* provided that it was the responsibility of “the fathers, grand-fathers, mothers, grand-mothers, children and grandchildren of paupers” to look after the poor and if they failed to do so, then they would have to reimburse the township at a rate of 5 s per week.<sup>262</sup> Therefore, relief for the poor was thought to be primarily the responsibility of families - the state would only step in when they could not do so. Furthermore, poor relief also provided that where a man has left his wife and children the overseers could seize his goods and his land and receive his rents.<sup>263</sup>

Poor relief in the counties and the system of poor relief in Halifax were quite different. In the counties, poor relief was administered largely by outdoor relief, that is, the poor were more often maintained in their own homes than in asylums, although these did exist in the counties. Furthermore, the poor were often maintained as well as by the informal assistance of family, church and community.<sup>264</sup> Up until 1879 there were even reports of the sale of paupers at auction.<sup>265</sup> The process of “bidding off” a pauper has been explained in the following:

For many years it was customary for certain ratepayers to “bid off” one or more poor men, women or children for stipulated sums to be paid weekly by the town. In these cases, where it was possible, the ratepayers made the poor whom they bidded off, useful in their homes; for such service and for the sum they received, giving the unfortunates board, lodging and clothes. Many persons also, who became town charges were “farmed out” to men who made their living wholly or in part by boarding them. In 1815, the sum raised in Cornwallis for keeping the poor was two hundred and forty pounds.<sup>266</sup>

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<sup>262</sup> *The Poor*, SNS 1758, Title 72, no 12.

<sup>263</sup> *Ibid*, no 13.

<sup>264</sup> Senior Scribes, *supra* note 135 at

<sup>265</sup> *Ibid* at 17.

<sup>266</sup> *Ibid*.

While in the counties the poor were provided for by this system of settlement and “outdoor relief”, by contrast, poor relief under the *Poor Law* in Halifax was provided only by way of “indoor relief”.<sup>267</sup> This meant that if a person or family applied for poor relief in Halifax, they would have to take up residence, and often work, in the Poor House, or if eligible, in a specialized asylum. Furthermore, transients who had no settlement in the counties – including the large number of immigrants who flooded into Halifax from the mid-18<sup>th</sup> century – were supported at the expense of the Provincial government, in the city’s institutions.<sup>268</sup>

In 1759 a workhouse was built in Halifax in order to house the city’s poor as well as the city’s criminal population.<sup>269</sup> The house was established so as to put the able-bodied poor and the criminal to work and to reimburse the city ratepayers and the province for the money paid to support them<sup>270</sup> as well as to serve as a house of correction.<sup>271</sup> Nova Scotia was the first jurisdiction in what would become the Confederation of Canada to pass vagrancy legislation. In 1759, a vagrancy law was passed, which authorized justices of the peace to commit disorderly persons, vagabonds, and persons of lewd behaviour to a house of correction in Halifax.<sup>272</sup> The Act provided justices of the peace could “commit drunkards, persons of lewd behaviour, vagabonds, runaways, stubborn servants and

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<sup>267</sup> Fitzner, *supra* note 260 at 20. Although as Fingard notes, the Association for Improving the Conditions of the Poor, and the St. Vincent de Paul in Halifax did provide some private outdoor relief with “friendly visiting” for a time. Fingard, *Victorian Halifax*, *supra* note 146 at 153.

<sup>268</sup> Fitzner, *ibid* at 8.

<sup>269</sup> *Ibid* at 3.

<sup>270</sup> *Ibid* at 9.

<sup>271</sup> *An Act for regulating and maintaining a House of Correction or Work-House within the Town of Halifax*, SNS 1759, c 1.

<sup>272</sup> *Ibid*, s 2.

children, and persons who notoriously misspend their time to the neglect and prejudice of their own or their family's support."<sup>273</sup> In 1763 part of the workhouse was set aside as a Poor House to house the non-able-bodied.<sup>274</sup> In 1767 the workhouse was closed due to inefficiency, but the Poor House section remained open.<sup>275</sup> In 1785, the Poor House took over the orphans from the Province's orphan homes.<sup>276</sup>

In 1750 a Hospital had also been opened by the colonial government to house the sick – largely soldiers. However, several decades later the hospital closed and was turned into an almshouse.<sup>277</sup> By the end of the 18<sup>th</sup> century then, the Poor House and the almshouse were the two major sources of poor relief in Halifax besides the several religious or ethnic based organizations listed above. This relief proved unable to handle the masses of impoverished that flooded into the city from the counties and from overseas. At the end of the century another workhouse or “House of Correction” was built in Halifax on the spot where the Poor House stood. The House of Correction contained cells and mandated that all the able-bodied work, in an attempt to generate profits to alleviate the financial strain of providing for the poor, but also to discourage “idleness”.<sup>278</sup> Besides a growing influx of the poor in the city, one writer has speculated that racist motivations were behind the rebuilding of the workhouse. At this time a number of maroons had arrived from

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<sup>273</sup> *Ibid.*

<sup>274</sup> Fitzner, *supra* note 260 at 20.

<sup>275</sup> *Ibid* at 19. *Ibid* at 19. Fitzner writes that it is likely the workhouse was reopened due to the arrival of Maroons, Black immigrants from Jamaica. The racism in Nova Scotia at the end of the 18<sup>th</sup> century towards the Maroons and indeed all persons of colour living in the Province were intense – depictions of the “negro” as “poor blacks” and as “indigents” were pervasive.

<sup>276</sup> *Ibid* at 13.

<sup>277</sup> *Ibid* at 19.

<sup>278</sup> *Ibid.*

Jamaica.<sup>279</sup> Racist attitudes saw the confining of black immigrants in need as more easily justifying the opening of another workhouse which would not only provide relief – but would also provide punitive measures for insubordination and “idleness”.

Jim Phillips has written about how vagrancy laws became an important means of maintaining order amongst Halifax’s poor in the 18<sup>th</sup> and 19<sup>th</sup> century and discouraging “idleness”. Vagrancy laws regulated the “vagrant as a status offender, one who threatened social order by living in a socially unacceptable though not otherwise illegal manner, or by appearing likely to commit other crimes.”<sup>280</sup> In 1851 with the first revision of Nova Scotia’s statutes, the 1759 vagrancy legislation was replaced with an act dealing with “madmen and vagrants” which provided:

Persons who unlawfully return to any place whence they have been legally removed as paupers, and idle and wandering persons having no visible means of subsistence, and persons going about to beg alms, shall severally be deemed common vagrants, and may be brought up and summarily convicted by a justice of the peace, and thereupon imprisoned for not more than one month.<sup>281</sup>

Persons found to run afoul of vagrancy laws would be sentenced to a prison term or fined. It is unlikely that a person in poverty in mid-19<sup>th</sup> century Halifax could have afforded to pay the fine and so levels of incarceration for vagrancy were high. Phillips indicates that rates of “recidivism”, or the repeat institutionalization of some persons, reveals not only the focus of vagrancy laws on the poor and unemployed, but the difficulty of breaking this cycle of poverty.<sup>282</sup> Furthermore, if an inmate could not show that they could be financially self-sufficient if released, then they would be sent to another asylum for the poor on

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<sup>279</sup> *Ibid.*

<sup>280</sup> Jim Phillips, “Poverty, Unemployment, and the Administration of Criminal Law: Vagrancy Laws in Halifax, 1864-1890” in Philip Girard and Jim Phillips, eds, *Essays in the History of Canadian Law*, Vol 3 (Toronto: Osgoode Society, 1990) at 129.

<sup>281</sup> *Ibid*; RSNS 1851, c 104.

<sup>282</sup> *Ibid* at 141.

release. Phillips reports that “[o]n at least 126 occasions during these years the old, the young, the sick, and the indigent were variously dispatched to the poor house, the hospital, reformatories, or the industrial school very shortly after committal.”<sup>283</sup> Phillips reports that a total of 5.6% of committals between the years 1864 to 1890 were children. He writes that “the practice of sending children to reformatories was commonplace, and drew applause from city officials.”<sup>284</sup>

The mid- 19<sup>th</sup> century also saw an increasing concern to distinguish between the able-bodied poor able to work and earn for the poor house, and the infirm.<sup>285</sup> In England, 1834 saw the introduction of the *Poor Law Amendment* which sought to end the provision of outdoor relief to paupers and introduced only indoor relief – that is, the provision of relief only to those who lived in the Poor House or workhouse – by mandating the building of workhouses. The amendment was introduced in the belief that outdoor relief “demoralizes the poorer classes and pauperises them.”<sup>286</sup> This concept of “pauperism”

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<sup>283</sup> *Ibid* at 139.

<sup>284</sup> *Ibid*. Vagrancy was constructed not only to regulate the lower classes of Halifax, but to maintain the operations of denominational and racial subjugation in the city, as well. While only 40% of the city was Catholic, Catholics made up 60% of the incarcerated. Furthermore, while racialized Nova Scotians made up only 3% of Halifax residents they made up 11% of those imprisoned. Finally, vagrancy laws were also used to institute a certain sexual regulation in the city. Between 1864 and 1890, “men offended the vagrancy laws more often than women did, although only marginally so – 52.6 to 47.4 per cent. Women were mostly incarcerated for the crime of prostitution under vagrancy laws in Halifax. Interestingly, 47.4% incarceration rates for vagrancy were high for women when compared to statistics out of Massachusetts and England. In those jurisdictions, incarceration rates for men were 75% and 85% respectively. Phillips indicates that a possible explanation was “the substantial prostitute population” in Halifax at the time. Women could obtain a release from prison by agreeing to go into domestic service. Finally, the rate of imprisonment for vagrancy did lose some of its force by the 1890s, perhaps because of the work social reform movements, the instituting of anti-cruelty laws and the focus on intemperance. By the late 1890s the rates of imprisonment for vagrancy were low (15 women and ten men) while incarceration rates for “drunks” and “others” was relatively consistent. *Ibid* at 136-137.

<sup>285</sup> Senior Scribes, *supra* note 135 at 25.

<sup>286</sup> See Charles R Drysdale, *The Population Question According to TR Malthus and JS Mill: Giving the Malthusian Theory of Overpopulation* (London: G Standing, 1892), online: Internet Archive, <<https://archive.org/details/populationquestoodrysgoog>>.

became an important means of describing and working with the poor. Pauperism became synonymous with the condition of “dependency” and “degeneracy” that lead the able-bodied poor to become paupers on poor relief.<sup>287</sup> Thomas Malthus and his followers, who had a great influence on amendments to the *Poor Law* in Britain, and promoted the idea that charity promoted idleness among the able bodied paupers and promoted “dependency”.<sup>288</sup>

In order to prevent dependency, an unappealing system of poor relief<sup>289</sup> as well as a system which policed and addressed the criminal and immoral behaviour of the poor, was needed.<sup>290</sup> In Halifax, for example, there were voluntary charitable societies in the early years in Halifax such as the Poor Man’s Friend Society,<sup>291</sup> which did not discriminate on the basis of deservedness in the provision of the relief to the poor. However, it has been speculated that the use of Malthusian thought by some opponents of the poor law lead the Society to eventually provide relief only to the non-able bodied and then shut down its work in 1827.<sup>292</sup> Hostility against the able-bodied and a suspicion of their pauperist nature

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<sup>287</sup> It is important to note that “pauperism” as an explanatory framework is distinguishable from “poverty”. Pauperism was understood as a condition of the poor degenerating into antisocial behaviour and posing a danger to society through vagrancy, immoral behaviour and crime. Giovanna Procacci, “Social Economy and the Government of Poverty,” in Graham Burchell, Colin Gordon and Peter Miller, eds, *The Foucault Effect: Studies in Governmentality*, (Chicago: University of Chicago Press, 1991) at 159.

<sup>288</sup> Fitzner, *supra* note 260 at 29.

<sup>289</sup> See for example, Nadja Durbach, “Roast Beef, the New Poor Law, and the British Nation, 1834-63” (2013) 52 *J of Brit Stud* 963 at 965.

<sup>290</sup> Phillips, *supra* note 280.

<sup>291</sup> *Ibid* at 39. The society was established in 1820. It provided soup, wood, and some employment for all poor regardless of whether or not they were “able-bodied” or “infirm”.

<sup>292</sup> George E Hart, “The Halifax Poor Man’s Friend Society, 1820-27: An Early Social Experiment” 34 *Can Hist Rev* (1953) 109 at 120.

and fear of “dependency” provided that the only suitable support for these men and women was to provide them with work, no matter how meager or demeaning.<sup>293</sup>

While the “able-bodied” poor were stigmatized as “idle”, “dissolute” and “dependent” on the one hand, on the other hand, public sentiment was growing in favour of the non-able-bodied poor and dependent. For instance, since its founding, children, the elderly, the disabled, and able-bodied men and women were all kept together in the Poor House.<sup>294</sup> By the middle of the century, however, there was greater concern for dividing and categorizing the Poor House inhabitants by sex, age, and infirmity. Increasing attention was paid to the deplorable conditions that the Poor House provided for children, the disabled and the elderly who were not able to work.<sup>295</sup>

The mid-19<sup>th</sup> century also saw the emergence of a number of voluntary agencies and religious societies who focused their work specifically on providing for these deserving poor: the Sisters of Charity (Home of the Guardian Angel, Saint Joseph Orphanage), Saint Vincent de Paul Society, Halifax Visiting Dispensary, Protestant Orphanage, Victoria Hall (Home for Women), Halifax Association for the Improvement of the Poor, Halifax Infants’ Home and the Society For the Prevention of the Cruelty. These charitable societies all developed in the three decades between 1849 and 1877 and would prove to have a significant effect on the way that that relief would be administered to the poor at the end of the 19<sup>th</sup> century in Halifax. Indeed, these charitable organizations and the philanthropists that formed their ranks would have a significant effect on how the problem

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<sup>293</sup> *Ibid.*

<sup>294</sup> Rooke and Schnell, *Discarding the Asylum*, *supra* note 143.

<sup>295</sup> Cheryl Lee Des Roches, *A Place to Call Home: A Comparison of the Development of State Funded Institutional Care for the Indigent Aged in Nineteenth Century Nova Scotia and Ontario* (Queen’s University Thesis, 2008) at 87.



of poverty, and the poor themselves, would come to be constructed in society at that time.<sup>296</sup>

Specialized institutions for the deserving poor, as opposed to just the Poor House or workhouse to house all the poor, began to be viewed as the preferred modern and scientific way to provide for the deserving poor.<sup>297</sup> Government expenditure on the poor reflected this categorization of and specialized attention upon the deserving poor. In 1858 the Mount Hope Hospital for the Insane was erected in Dartmouth and in 1859, the Province built the City Hospital and then the Victoria General in 1865.<sup>298</sup> The Halifax Industrial School was built in 1865 and the Halifax Infants Home, and the Grove for inebriates were built in 1875.<sup>299</sup> Large, modern institutions were the way in which the state exhibited its modern, progressive investment in the deserving poor.<sup>300</sup> An increasing focus on institutionalization also corresponded with an increased role of the state and provincial government funding – first, the colonial and then the Provincial government post Confederation.<sup>301</sup> Hospitals, jails and institutions for the insane required the support of government expenditure.

However, even these government expenditures and the municipal system of settlements under the *Poor Law* were inadequate to provide relief for the poor, especially in the city of Halifax which tended to receive both immigrants from abroad, Nova Scotians

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<sup>296</sup> Senior Scribes, *supra* note 266 at 36.

<sup>297</sup> Rooke and Schnell, *Discarding the Asylum*, *supra* note 143 at 48.

<sup>298</sup> Des Roches Thesis, *supra* note 295 at 96.

<sup>299</sup> Fingard, *Victorian Halifax*, *supra* note 146 at 122.

<sup>300</sup> Des Roches Thesis, *supra* note 295 at 96.

<sup>301</sup> Cheryl DesRoches, “For them but Never Really Theirs: Finding a Place for the ‘Aged’ within State-Funded Institutions in Nineteenth-Century Nova Scotia” (2009) 20.1 J of the Can Hist Assoc 57 at 60.

from other parts of the province and the “transient” poor, who had no other settlement under the *Poor Law*.<sup>302</sup> Of all the Maritime provinces the processes of urbanization that had been spurred on by changes to the “wood, wind and sail” economy” were most pronounced in Nova Scotia. Figures from this time show that while the province was 92% rural in 1861, this percentage decreased to 72% in 1901, with the proportion of the population living in urban centers rising to 28%.<sup>303</sup> This increase of 20% of the population from rural to urban centers means that from 1861 to 1901, one in five people who had been living in rural Nova Scotia moved to a city. In 1871, an article in the newspaper, the *Acadian Reporter*, complained about the tendency “of the sons and daughters of farmers to make escape...[and] to flock into towns here” as well as to crowd into small hotels in Halifax.<sup>304</sup> From 1871 to 1921 estimates show that the population of the city of Halifax doubled from 29,582 to 58,372 people.<sup>305</sup>

But as Judith Fingard has pointed out, the changes that were brought on by the transition in the economy, such as industrialization and urbanization, were not the only changes to affect the lives of the poor in Halifax between the 1860s to the 1890s.<sup>306</sup> Fingard points to four other major influences on the lives of the poor in late-19<sup>th</sup> century Halifax: military use of the “upper streets”<sup>307</sup> and importantly, a triad of civic reformers, moral crusaders, including the temperance crusaders, and the activity of the churches, exerted a

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<sup>302</sup> Fitzner, *supra* note 138 at 7-8.

<sup>303</sup> Brookes, *supra* note 56 at 33.

<sup>304</sup> *Ibid.*

<sup>305</sup> LD McCann, “Staples and the New Industrialism in the Growth of Post-Confederation Halifax” (1989) XIX.1 *Acadiensis* at 52.

<sup>306</sup> Fingard, *Victorian Halifax*, *supra* note 146 at 21.

<sup>307</sup> Streets up the hill from the Halifax Harbour, for example, what is today known as Market Street, where a great deal of the poor in the city would live.

great deal of influence on reform of Halifax's underclass at the end of the century.<sup>308</sup> The activity of last two of these forces – the moral crusaders and the churches, particularly the city mission – was especially intertwined and would come to have important effects on the lives of the poor in the city. Both moral crusaders and the churches advanced the temperance cause and by 1885 there were 21 temperance societies in the Halifax-Dartmouth area.<sup>309</sup> The Halifax City Mission, for example, had been undertaking friendly visiting to the homes of the poor since its creation in 1852. As Fingard notes, “Their frequent visitations to the houses of the poor and outcast gave them ample opportunity to identify sickness, sloth, violence, crime and immorality, all of which they blamed on the misuse of alcohol.”<sup>310</sup> The mission, however, like other charitable organizations at the time also focused on “illiteracy, prostitution, juvenile delinquency and family squalor, prominent features of underclass life.”<sup>311</sup>

But it was not just members of the religious orders that were prominent in the social reform movements that would come to have such an important effect on the regulation of the poor in Halifax at this time. Fingard has provided us with a sketch of who filled the ranks of the philanthropy movement in Victorian Halifax:

In Halifax, as in England and America, volunteers and paid agents concerned with prevention, rescue and salvation represented a broad cross-section of society from the gentry class to the working class. Among the former was Isabella Binney Cogswell, a wealthy spinster who was prominent in most Protestant charitable ventures involving women and children until her death in 1875. In the middle ranks were many of the city's clergymen, businessmen and professionals and their wives, sisters and daughters who donated ideas, money and volunteer time. At the lower end of the social scale were the actual city missionaries and agents, usually laymen, who came to the work in their middle age after experience as small businessmen, artisans or soldiers. The activist lay women were usually the wives or widows of

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<sup>308</sup> Fingard, *Victorian Halifax*, *ibid* at 21-28.

<sup>309</sup> *Ibid* at 27.

<sup>310</sup> *Ibid* at 119.

<sup>311</sup> *Ibid*.

such men. Among the trained religious who devoted their efforts to the city's social problems were Catholic nuns and Salvation Army officers, people drawn normally from the lower classes. Many of the patrons, volunteers, paid agents and trained workers were British immigrants whose appreciation of social problems had been honed in the old country; a few had American experience. All of them were stalwart supporters of the temperance cause.<sup>312</sup>

Women's activity in this philanthropic movement in Halifax was significant and helped to shape the focus of social reform.<sup>313</sup> In Halifax, women's organizations such as the Women's Christian Association and the Women's Christian Temperance Union also organized around the issue of temperance, holding that "Drink...is the great evil."<sup>314</sup> The reform movement in Halifax was heavily influenced by the churches and in particular, by the divisions between the Protestant and Catholic churches. As Fingard has reported, almost 40% of the city was Catholic at this time. Furthermore, a majority of the "underclass" with whom these philanthropists were concerned were also Catholic.<sup>315</sup>

Not only was this reform movement divided by denominations but by race. As Morton points out, participation by African-Nova Scotian women in the private philanthropy movement developed somewhat later than that of their white counterparts, in part because white women's participation in the private philanthropy movement was largely in an auxiliary role to men's leadership in the areas. In the African Nova-Scotian churches, by contrast, women were at the center of financial and spiritual leadership. Morton has documented proceedings from the African Baptist assembly at which prominent female reformers spoke of the Christian woman's duty in controlling alcoholism

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<sup>312</sup> Fingard, *Victorian Halifax*, *supra* note 146 at 117-118.

<sup>313</sup> For a discussion see Ted Rutland, "Where the Little Life Unfolds: Women's Citizenship, Moral Regulation and the Production of Scale in Early Twentieth-Century Halifax, Nova Scotia" (2013) 42 *J of Hist Geo* 167.

<sup>314</sup> *Ibid* at 140.

<sup>315</sup> *Ibid* at 27-28.

and staving off the sinful behavior.<sup>316</sup> Like the white churches, African-Nova Scotian churches were much taken up with the temperance cause in late-19<sup>th</sup> century Nova Scotia, however, women's philanthropic work in the name of temperance didn't develop into a more fulsome engagement until the early 20<sup>th</sup> century.<sup>317</sup>

The white middle class female reformers of the mid-to –late 19<sup>th</sup> century in Halifax were concerned not just with temperance, however, but the moral reform of a certain “criminal class” in the city at the time.<sup>318</sup> For example, Fingard has detailed the concern of the Local Council of Women at the end of the century with prostitution and closing houses of “ill-repute”.<sup>319</sup> Reformers at the time adhered to pauperist notions of the deserving poor, but had a particular moralized outlook on poor women as vagrants. The sexuality of impoverished women, their unwed pregnancy and their prostitution, held a particular threat to the maternalist ideology advanced by many female reformers at the time. Racist notions of “inferiority” can also not be divorced from these ideas. As Fingard details, not only were working class wives, and girls from the counties found among the ranks of prostitutes in Halifax at that time, but African Nova Scotian women, being amongst the poorest members of Haligonian society at the time, could be found in these houses of ill-repute.<sup>320</sup> While African Nova Scotians comprised only 3% of the population of Halifax, by

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<sup>316</sup> *Ibid* at 80.

<sup>317</sup> Suzanne Morton, “Separate Spheres in a Separate World: African-Nova Scotian Women in late-19<sup>th</sup>-Century Halifax County (1993) XXII.2 *Acadiensis* 61 at 82.

<sup>318</sup> Fingard, *Victorian Halifax*, *supra* note 146 at 95.

<sup>319</sup> *Ibid*.

<sup>320</sup> *Ibid*.

the mid-to-late 19<sup>th</sup> century African Nova Scotian women comprised 40% of jailed prostitutes.<sup>321</sup>

Not only were middle class women focused on prostitution, but their status as natural caregivers gave them a special authority in working with the children of the city's poor. Early maternalist ideology that vaunted the position of women as mothers, developed in tandem with the project of child saving in philanthropic activity of the time, as mothers took an important place as guardians of this childhood.<sup>322</sup> Both religious conservative and progressive women's movements drew upon this emphasis on childhood and innocence to promote women's positions within the home and consequently, within society.<sup>323</sup> Mothers became important partners in ensuring the proper upbringing of children and their proper socialization as upstanding citizens.<sup>324</sup> The interrelationship between the women's movement, social reform (including temperance and work with children) has been described by historian Robert McIntosh in the following:

Organizations such as the National Council of Women of Canada, which was founded in 1893, sponsored efforts to improve children's health through well-baby clinics, children's playgrounds, anti-smoking campaigns and the promotion of domestic science. Women's Institutes had a strong interest in child welfare issues as well. The Woman's Christian Temperance Union, which was formed to fight alcohol consumption, enrolled children in special organizations on the basis of the "triple pledge" to forswear liquor, tobacco and bad language. Its goals came to include further regulation of children's leisure: scrutinizing their literature, demanding curfews and advocating stiffer children's protection legislation.<sup>325</sup>

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<sup>321</sup> *Ibid.*

<sup>322</sup> Gordon, "Family Violence, Feminism and Social Control", *supra* note 43 at 470. Rutland, *supra* note 313.

<sup>323</sup> *Ibid.*

<sup>324</sup> Vandepol, *supra* note 252 at 227.

<sup>325</sup> Robert McIntosh, "Constructing the Child: New Approaches to the History of Childhood in Canada" (1999) 28.2 *Acadiensis* 126 at 129.

In Halifax, the Protestant Infant's Home and the Home of the Guardian Angel were opened in 1875 and 1886, respectively, in order to assist working women to care for their children.<sup>326</sup> The focus of the home was to provide a safe place for working women – even unwed mothers – to place their children during the day.<sup>327</sup> But reform work on behalf of children was not always so supportive of both parent and child. Both a fear of crime and delinquency amongst the lower classes<sup>328</sup> and a desire to remove children from situations of impoverishment and destitution resulted in a campaign for poor children to be removed from their parents and either removed to the country or to one of the city's institutions.<sup>329</sup>

The Halifax Industrial School, for example, was opened with the participation of the Protestant city mission in 1863 as a facility that would remove the children from “injurious associations and have time and opportunity for improvement in all that is calculated to make them useful members of society.”<sup>330</sup> Children were employed there in paper-bag-making, shoemaking, boot-blackening and errand-running.<sup>331</sup> The Catholic Church was also involved in the creation of industrial schools, with the Saint Patrick's Home for boys in 1885 and the Good Shepherd Industrial Refuge in 1890.<sup>332</sup> As there was yet no legislation allowing for the missions to carry out this type of work, the removal of children happened in a legal grey area. There is some indication that parental consent was given to the

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<sup>326</sup> Fingard, *Victorian Halifax*, *supra* note 146 at 124.

<sup>327</sup> *Ibid.*

<sup>328</sup> Rooke and Schnell, *Discarding the Asylum*, *supra* note 143 at 40.

<sup>329</sup> Fingard, *supra* note 146 at 126.

<sup>330</sup> *Ibid* at 126.

<sup>331</sup> *Ibid.*

<sup>332</sup> Fitzner, *supra* note 138 at 44.

removal, particularly at the urging of denominational personnel.<sup>333</sup> Legislation specifically providing for judges to institutionalize these children without parental consent would come with the introduction of the *Prevention and Punishment of Wrongs to Children Act* in 1882.

A quick review of the bulk of new domestic relations legislation introduced by the end of the 19<sup>th</sup> century in Nova Scotia confirms that the legislation was largely concerned with children and their moral as well as physical safety: the rescue of children,<sup>334</sup> the prevention of use of tobacco and opium,<sup>335</sup> the reform of juvenile offenders,<sup>336</sup> the transfer of immigrant and orphaned children,<sup>337</sup> the licensing of boarding houses for children,<sup>338</sup> and the prevention of children from entering into and/or working in shops for certain hours.<sup>339</sup> The concern with destitute children, orphans, juvenile delinquents, lunatics and

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<sup>333</sup> Fingard has detailed how the city mission also carried out child-saving of its own, which appears largely to have been accomplished by obtaining the consent of parents:

A policy evolved in the 1870s of removing children from their city homes and sending them for the rest of their childhood to foster homes in the country. By 1878 the missionary [Adam Logan] reported that he had rescued forty-two destitute children from evil influences. In 1882 alone he obtained the consent of parent to find homes for twelve children in the country, the object being “to rescue them from the evils of poverty and lives of future crime and place them where they may become useful and valuable members of the community.” The fact that Logan was able to persuade parents to give up their children suggests that he was a key figure in his community. He might of course have suggested to reluctant parents that this course was a better alternative than calling in the Society for the Prevention of Cruelty to investigate family problems. [citations omitted]

Fingard, *Victorian Halifax*, *supra* note 146 at 130.

<sup>334</sup> *Prevention and Punishment of Wrongs to Children*, SNS 1882, c 95.

<sup>335</sup> *Prevention of the Use of Tobacco and Opium by Minors*, SNS 1892, c 50.

<sup>336</sup> *Maintenance and Reform of Juvenile Offenders*, SNS 1890, c 23.

<sup>337</sup> *Of the Transfer of Immigrant and Orphan Children*, RSNS 1900, c 118.

<sup>338</sup> *Of the Licensing of Boarding Houses for Infants Under Twelve Years of Age*, SNS 1897, c 40.

<sup>339</sup> *Of the Closing of Shops and the Hours of Labour Therein for Children and Young Persons*, SNS 1895, c 17.



inebriates also gives us a clue to the ways in which this new domestic legislation interacted with the growing use of institutions within the province to care for these groups. Legislation for children, lunatics and inebriates each provided for warrants for their restraint, the appointment of guardians for their care, their removal to institutions if within the city of Halifax, and provisions for determining their settlement in order to establish which township was responsible for them financially.<sup>340</sup>

This new system of classification and subsequent institutionalization required a shift in outside intervention into the family and the way that law and society conceived of the child. Whereas in the common law family the child was conceptualized as the property of the father, the changing legal family at the end of the 19<sup>th</sup> century in Nova Scotia saw the concept of “child” emerge as more than mere chattel and the legal role of the parent shift closer to that of trustee. If we reflect back upon domestic legislation in the middle of the 19<sup>th</sup> century in Nova Scotia we see children’s legal personhood regulated in much the same way as servants. According to the *Act of Masters, Apprentices and Servants*, a father could bind his child as apprentice, subject only to his obligation to inquire into the treatment of the child by the master.<sup>341</sup> Furthermore, pursuant to the common law, the father owed his child obligations of maintenance, protection and education, and he could not totally disentitle the child to property by the ancient laws of distribution. However, other than these sometimes vague constraints, the regulation of the child and the child’s activity was left very much to paternal purview. While Blackstone may have bemoaned the absence of statutory authority to intervene in the family and enforce the father’s duty to “educate” his child, the absence of such legislation was very much in accordance with maintaining the private sphere of the common law family. The social promotion of childhood and the

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<sup>340</sup> See SNS 1882, c 50; *The Custody and Estates of Lunatics*, RSNS 1900, c 125, “The Lunacy Act”; *Of the Guardianship and Care of Inebriates*, RSNS 1900, c 126.

<sup>341</sup> SNS 1858, c 125, ss 1 and 10.

subsequent creation of the “child” as a distinct legal category, however, would have significant effects for the way the common law family was regulated.

Philanthropic concern for the child precipitated the legal creation of a sphere of childhood which kept children from work, in schools, and away from negative moral influences.<sup>342</sup> The common law had provided that at the age of 7 a child would be subject to same legal sanctions as an adult. Children of the labouring classes and urban poor were made to work as soon as possible in order to contribute financially to the family. As one historian explains:

Work was central to the lives of the great majority of children until well into the 20th century. Boys and girls contributed to the household to the extent that they were able to do so, labouring on the farm, in the fishery or in the woods, as domestic servants or as apprentices in crafts. As Canadian industries developed in the late 19<sup>th</sup> century, growing numbers of children worked for wages with unprecedented regularity and intensity in the new mines, mills and factories, often far removed from their parents. At the same time, other children roamed the streets of the major urban centres, earning their living by shoe-shining, newspaper sales and other street trades, by performing small services such as opening doors or offering entertainment, or by begging, petty theft or prostitution.<sup>343</sup>

In order to create a sphere of “childhood” free from the urbanizing, industrializing influences of a burgeoning capitalist society, a space of childhood was created by domestic legislation at the end of the 19<sup>th</sup> century: by preventing children from entering the workforce too early,<sup>344</sup> preventing their presence in immoral places such as saloons and places of entertainment,<sup>345</sup> preventing their use of alcohol, tobacco and opium<sup>346</sup>,

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<sup>342</sup> Rooke and Schnell, *Discarding the Asylum*, *supra* note 143 at 23; Anthony M Platt, *The Child Savers: The Invention of Delinquency* (Chicago: University of Chicago Press, 1977) at 15.

<sup>343</sup> McIntosh, *supra* note 325 at 126.

<sup>344</sup> *Closing of Shops and the Hours of Labor Therein for Children and Young Persons*, SNS 1895, c 17.

<sup>345</sup> *Prevention and Punishment of Wrongs to Children*, SNS 1882, c 95.

<sup>346</sup> *Prevention of the Use of Tobacco and Opium by Minors*, SNS 1892, c 50.

providing for greater regulation of their sexual activity, and by compelling their attendance at school. For example, in 1886 the criminal law was amended to create a felony offense of sexual relations in a brothel with a girl under 12; this age was raised to 14 in 1890. In 1873 the *Mines Act* was introduced in Nova Scotia in order to keep children under 10 out of the mines; the age was raised to 12 years of age in 1891.<sup>347</sup> And in 1901 the *Factories Act* appeared in Nova Scotia, regulating the minimum age of employment and maximum hours of work therein.<sup>348</sup>

The end of the 19<sup>th</sup> century saw not just the creation of public institutions, but the introduction of public schools and compulsory education. Compulsory education helped to keep the potentially wayward children of the under classes off city streets and socialized towards productive work. In 1892, compulsory education was introduced in Halifax.<sup>349</sup> Section 10 of the Act provided for penalties for parents or guardians who failed to compel their child – between the ages of 8 and 14 – to attend school for 6 months out of the year. Section 10 of the Act provided:

Every parent, guardian or other person having charge of any child in the city of Halifax, failing to comply with [causing such child to attend some public or private day school at least six months in each year], shall be liable on summary conviction before the stipendiary magistrate, to a fine of not less than one or more than twenty dollars and costs for the first offence, and for every second or subsequent offence to a fine of one dollar and costs for each school day that the law is not complied with, provided, however, that the same person shall not be fined more than sixty dollars, exclusive of costs, in any one year.

The Act also introduced the legal concept of “truant” – that is, a child between the ages of 8 and 14 who for 10 days or more, not necessarily consecutive, had not been

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<sup>347</sup> See Robert McIntosh, “The Boys in the Nova Scotian Coal Mines: 1873-1923” (1987) 16.2 *Acadiensis* 35 at 40.

<sup>348</sup> SNS 1901, c 1.

<sup>349</sup> *An Act Respecting Compulsory Education in Halifax*, SNS 1892, c 61.

attending school.<sup>350</sup> Any child who was suspected of being a “habitual truant” could be brought before the stipendiary magistrate and committed to “such reformatory, industrial school, home for children or orphan asylum in the city of Halifax” until the child reached 14 years of age.<sup>351</sup> The city was responsible for paying the expenses of the child, but the city could also pursue the parents of the habitual truant to be reimbursed for these expenses.

The creation of the legal category of truant was an important step in the process of regulating the lower classes. As Judith Fingard has written about public education in 19<sup>th</sup> century Halifax, “education was seen as the means of making the population more productive and society more consumer-oriented.”<sup>352</sup> With the concept of the habitual truant, the judiciary, the state, religious societies and the private philanthropy movement gained greater access to the children of the lower classes. For a family living in poverty in 19<sup>th</sup> century Halifax, it would be likely that a child between the ages of 8 to 14 years might miss 10 days of school in the 6-month-long school year, as these children would have been able to earn small wages to contribute to their families. Failing to prevent children from becoming truants would mean these children could be removed to the relevant infant’s home or industrial school.

Furthermore, the influence of philanthropic and religious societies on the legal and social definitions of a “proper childhood” and proper maternal care ensured that there was a specific moral content to these concepts. The concept of child and the legal regulation of the activity and behaviour of the child was suffused with notions of a “proper” childhood.

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<sup>350</sup> *Ibid*, s 17.

<sup>351</sup> *Ibid*, s 19.

<sup>352</sup> Judith Fingard, “Attitudes Toward the Education of the Poor in Colonial Halifax” 2.2 (1973) *Acadiensis* 15 at 42.

Educating the lower classes fulfilled the goals of not only maintaining order and industry, but also instilling a certain moral uprightness. As one historian has explained,

By the end of the 19<sup>th</sup> century, however, concern for the promotion of moral and ethical instruction began to intensify. As society became industrialized and urbanized, traditional guarantors of morality and social stability – family, church, and small community – saw their effectiveness in that role steadily eroded.<sup>353</sup>

The notion of the proper Christian family included a particular gender order, religious and moral ideology, ideologies of racial superiority, as well as a commitment to the moral uplift of the poor. Reformers focused on intemperance and moral deficiency as an explanatory framework for most social ills.<sup>354</sup> Saving children, then, meant saving them from pauperism and the immoral character of their parents, which could lead them to an idle and dissolute lifestyle. Poor parenting behaviour such as placing a child in immoral situations, exposing the child to work too early, failing to send the child to school, or failing to supervise a child so that the child smoked or procured opium, might now see the child removed from the home and detained in an institution. The state and ratepayers would not have to care for able-bodied parents but only for the deserving children within the family and still maintain a modicum of correction on the family.

This legal regulation of the child allowed for an intervention in poor and working class families by philanthropic societies, denominational institutions and personnel and the police in ways that the old system of workhouses and poor relief would simply not have accommodated. Poor House overseers had been little concerned as to the care for children by parents living in the Poor House. Abandoned children or children caught committing crimes had simply been subject to vagrancy laws, sent to jails or industrial schools. But once the legal regulation of the poor left the confines of the *Poor Law* and the Poor House

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<sup>353</sup> Robert Nicholas Berard, “Moral Education in Nova Scotia, 1880-1920” 14.1 (1984) *Acadiensis* 49 at 49.

<sup>354</sup> Fingard, *Victorian Halifax*, *supra* note 146 at 118-119.

and entered the domestic sphere – any domestic sphere – it opened up the family and parental behaviour to the scrutiny of philanthropic societies and the criminal law regime in the name of this new concept of the child.

The *Prevention and Punishment of Wrongs to Children Act* and the Society that gave rise to the Act's introduction – the Society for the Prevention of Cruelty, were important pieces of regulating the family in the name of this reform movement. The Act contained the hallmarks of the movement: concern for the deserving figure of the child, regulation of a protectionist character, concern for the moral development of children as much as their physical protection, and reliance upon criminal law enforcement, institutionalization, and the interventions of philanthropic volunteers. Criminal law intervention, however, was not focused on the child – childhood had been accorded a sphere of innocence in Victorian discourse. Instead, by focusing on the guardianship interests of families in poverty, the transgressive behaviour of children could be addressing by criminalizing and punishing the actions of parents.

### **The Introduction of Canada's First Child Protection Act**

Canada's first Society for the Prevention of Cruelty (against animals) came into existence in 1877 against this historical backdrop in Halifax, as a product of the growing private philanthropy movement. The Society was created by largely wealthy, Protestant men who were highly influenced by social reform work that was being undertaken in Britain at the time.<sup>355</sup> Society members were vocal proponents of the temperance movement and included prominent members such as the Mayor of Halifax, judges and

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<sup>355</sup> Beverly MacDonald Dubinsky, *Rescued: Early Child Protection Legislation in Nova Scotia* (MSW Thesis, Dalhousie University, Maritime School of Social Work, 1995) [unpublished] at 14.

businessmen in the city.<sup>356</sup> The Society was created by the *Act to Incorporate the Nova Scotia Society for the Prevention of Cruelty to Animals*.<sup>357</sup> The Act granted Mayors – of Halifax and elsewhere – as well as wardens, “*custos rotulorum*”<sup>358</sup> and stipendiary magistrates the power to swear in special constables to enforce the *Prevention of Cruelty to Animals Act*.<sup>359</sup>

John Naylor was the first secretary-agent of the Society. A white British immigrant, he came from a modest middle-class background and in his professional life outside of the society he was at various times involved in real estate as well as being an employment agent, contract carter, poultry farmer, census enumerator and chief liquor inspector.<sup>360</sup> Naylor was in charge of prosecuting cruelty to animal cases in Halifax under the Act.<sup>361</sup> However, soon after the creation of the Society, Naylor was asked to investigate and intervene in cases of cruelty against women and children, even though the Society would not have the official mandate to do so until 1882.<sup>362</sup> In 1879, Naylor wrote to the secretary of the New York chapter of the Society for the Prevention of Cruelty and asked to see copies of their legislation pertaining to children. He explained that similar legislation was being contemplated by the Nova Scotia chapter of the Society.<sup>363</sup> The New York statute for the

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<sup>356</sup> *Ibid.*

<sup>357</sup> SNS 1877, c 86. The Act lists the founding members of the Society as the following: MH Richey (President), AH Woodill, D Nathan Tupper, BG Gray, Rev Robert Murray, and JC Mackintosh.

<sup>358</sup> Keeper of the rolls.

<sup>359</sup> Section 4.

<sup>360</sup> Fingard, *Victorian Halifax*, *supra* note 312 at 173.

<sup>361</sup> Dubinsky, *supra* note 355 at 15.

<sup>362</sup> This is the year in which the *Act for the Prevention and Punishment of Wrongs to Children*, SNS 1882, c 95 was introduced.

<sup>363</sup> Dubinsky, *supra* note 355 at 17.

protection of children would become the model for the introduction of anti-cruelty to children legislation enacted in Nova Scotia in 1882.

The first piece of legislation that provided for the protection of children was actually passed in 1880, with an amendment to the *Act to Incorporate the Nova Scotia Society for the Prevention of Cruelty to Animals* that allowed the Society to bring a complaint before any court or magistrate who had jurisdiction for laws pertaining to children under the age of sixteen.<sup>364</sup> The Society's first attempt at more comprehensive legislation occurred at the federal level a year later. In 1881, Society President and Member of Parliament Matthew Richey attempted to persuade the federal government to pass national legislation for the protection of children without success.<sup>365</sup> The Society's efforts then returned to the provincial level of government and in 1882 the Society successfully petitioned the Nova Scotia government to pass their prevention of cruelty to children legislation, based upon the precedent that they had received from the New York Society.

In 1882, the Legislature introduced the *Act of the Prevention and Punishment of Wrongs to Children*<sup>366</sup> – the first child protection statute in Canada. The 1882 Act was quite short, comprised of only seven provisions, and applied to minors under the age of sixteen. The Act cannot be said to have been wholly focused on the prevention of wrongs to children by parents and guardians; it also focused on the actions of proprietors, keepers or managers of certain unsavoury places. The Act was intended to prevent minors from being admitted to any “saloon or place of entertainment where any spirituous liquors or wines or intoxicating or malt liquors are sold” or in “any of the places of amusement known

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<sup>364</sup> *An Act to Amend the Act to incorporate the Nova Scotia Society for the Prevention of Cruelty to Animals*, SNS 1880, c 68, s 1.

<sup>365</sup> Fingard, *Victorian Halifax*, *supra* note 146 at 172.

<sup>366</sup> SNS 1882, c 95.



as dance houses, clubs, or concert saloons” nor into “any bawdy house of ill fame”.<sup>367</sup> A proprietor, keeper or manager who could be shown to have admitted a minor or allowed a minor to remain on the premises could be found guilty of an offence and liable to pay a fine, failing which, the offender would be committed to a common gaol.<sup>368</sup> Section 4 of the Act placed the onus on the accused to show that the minor was of age.

The legislated harms to children that ground the legal justification for relieving the parent of care and custody provided:

Whenever the parent or other person having the care and custody of a child [under the age of sixteen years], is convicted before any court or magistrate with having assaulted, beaten, ill-used, abandoned or treated said child with habitual cruelty and neglect, or said child is suffered to grow up without salutary parental control, or in circumstances exposing him or her to lead an idle or dissolute life and the court or magistrate before whom such suspicion is had, deems it desirable for the welfare of the child.<sup>369</sup>

The strong moral tone to the latter grounds: without salutary parental control and exposure to an idle and dissolute lifestyle, point to the private philanthropy or religious character of social reform work and legislation at the time. The circumstances that might expose a child to lead an idle or dissolute life were a product of the coupling of poverty and criminality in the minds of many of the upper and middle class in Halifax at the time.<sup>370</sup> The *Prevention and Punishment of Wrongs to Children Act* allowed for the interventions of police and philanthropic volunteers to address parental criminal behaviour, and also to address the failure of parents to properly socialize the child – a transgression not strictly within the scope of vagrancy or criminal law at the time. Furthermore, treating children as criminals did not accord with Victorian the view of children as the deserving poor and with

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<sup>367</sup> Section 1.

<sup>368</sup> Sections 5 and 6.

<sup>369</sup> Section 3.

<sup>370</sup> Phillips, *supra* note 280.

the view of childhood as a protected sphere of innocence and dependency.<sup>371</sup> Instead, responsibility had to be found elsewhere for the behaviour and proper socialization of children. While intervention with children was necessary, the notion of punishment had to be directed elsewhere. Focusing on the guardianship rights of parents and thereby “familializing” crime and punishment as far as wrongs to children were concerned, served to direct attention to punishing the wilful act of parents, not children.

The provisions of the Act complemented the work of the specialized institutions that had begun to transform the workings of the *Poor Law* in Halifax. The Act provided that the court could make an order removing the child from the care and custody of his or her guardian and have “the child committed to an orphan asylum, charitable or other institution, or such other disposition thereof as now is or hereafter may be provided by law in cases of vagrant, truant, disorderly, pauper or destitute children.”<sup>372</sup> The link between prevention of cruelty to children and the settlement and regulation of poor children is quite clear. The child protection activities of the Society were largely funded by way of municipal settlements of children garnered under the *Poor Law*, or by the enforcement of private provision for children by fathers under the *Bastardy Act* and enforced by the criminal law powers of the city.

The Act was also, however, very much a product of the “law and order” environment of the time.<sup>373</sup> The usual suspects involved in policing the poor: the police, the magistracy and the prison system – in conjunction with the private philanthropy movement – were to be the main players in this Act. Much of the Act is written in terms of

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<sup>371</sup> For a discussion of how child-saving grappled with this Victorian concept of childhood in Halifax, see Rooke and Schnell, *Discarding the Asylum*, *supra* note 143 at 96-97.

<sup>372</sup> Section 3.

<sup>373</sup> For a discussion see Michael Boudreau, *City of Order: Crime and Society in Halifax, 1918-35* (Toronto: UBC Press, 2012).

offences, fines, informants, summary convictions, imprisonment for failure to pay. While the first three sections of the Act set out the grounds that will find a child to be a product of cruelty and allow for the child to be removed from the premises or removed from parental custody and institutionalized, the final four paragraphs are concerned with charging persons with offences. Cruelty to children, then was seen very much in *Poor Law*, as well as criminal and vagrancy law terms – it was an offence to be found guilty of contributing to the moral endangerment of a child, to neglect a child or to physically harm a child. For this offence one would be fined for a sum of money not exceeding \$100 but no less than \$20.<sup>374</sup> If an offender did not pay the fine they would be confined to jail for not more than 90 days but not less than 30 days.<sup>375</sup>

The Act is important in terms of family law reforms as it is the first piece of legislation in Nova Scotia to allow judicial intervention into the family in the name of the welfare of the child. The Act provided that where a person having the care and custody of the child is found to have misused the child or allowed the child to grow up without salutary control, the court could make an order it “deems desirable for the welfare of such child.”<sup>376</sup> The courts would not have such legislated authority to intervene in determining private custody decisions between parents in the name of the welfare of the child until some 11 years later in the 1893 *Custody of Infants Act*. Before the introduction of the *Custody of Infants Act*, the Divorce Court could have made an order as to custody pursuant to the *Court of Divorce Act*, however, the legislative authority for custody did not contain an explicit consideration of the welfare of the child. Instead the Act merely provided:

The Court shall have the same powers in respect of or as incidental to divorce and matrimonial causes, and the custody, maintenance, and education of children, as

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<sup>374</sup> Section 4.

<sup>375</sup> Section 6.

<sup>376</sup> Section 4

are possessed by the Court for divorce and matrimonial causes in England, except as are enlarged or abridged, or altered or modified, by this Act and the Act hereby amended. But in causes instituted on the ground of adultery, the court shall not have authority to permit the introducing co-respondents, or to try the issue of fact by jury.<sup>377</sup>

Like the private family law reforms that would be contained in the *Custody Act*, the *Prevention and Punishment of Wrongs to Children Act* evidenced the state promoting the notion that child guardianship was not an absolute right of the father; rather, parents were to act more as trustees of children, attendant to the welfare of the child.

Furthermore, while the *Custody of Infants Act*, the *Alimony Act*, *Adoption Act* and *Matrimonial Property Acts* all saw advances in rights for women, these have to be contextualized against the patriarchal backdrop of the family. The courts could intervene to shift custody, support, property and rights to consent to adoption in favour of the wife or unmarried mother, but this did not serve to displace the primacy of the patriarchal position of the father. As we saw earlier, at common law it was the father who had the *de facto* claim to sole guardianship of the child, until the wife was able to succeed in court in displacing this presumption. While rules such as the “tender years doctrine” eventually helped the mother to convince the court that the welfare of the child was best met in her care, the reality was that she was required to ask the court to make such a pronouncement.<sup>378</sup> By contrast, the common law still provided that absent such an order from the court, the father had the sole *de facto* claim to guardianship of his legitimate child.

However, when we look at the text of the *Prevention and Punishment of Wrongs to Children Act* we see no such assumption of patriarchal supremacy contained in the Act.

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<sup>377</sup> *Court for Divorce Act*, SNS 1866, c 13, s 10. It is also noteworthy that as of 1867, the passing of divorce legislation would have been *ultra vires* the authority of the provincial legislature.

<sup>378</sup> And, as Constance Backhouse has pointed out, even when mothers did apply for custody, judges were often resistant to displace the father’s authority within the family. See Backhouse, “Pure Patriarchy” *supra* note 183 at 291.

The terms “parent and guardian” are used constantly without any reference to “father” or “mother”. Furthermore, the Act speaks only of “persons convicted” or “persons charged” with offences under the Act. The characteristically gendered dynamics of the common law family and of the newly introduced private family law acts of the late 19<sup>th</sup> century are not present in the *Prevention and Punishment of Wrongs to Children Act*.

While the absence of legislative support for the patriarchal workings of the common law family may at first appear progressive, it could likewise be seen as a clue as to the fundamentally different assumptions undergirding the Act, not only as to the nature of intervention, but also as to the nature of the family in which the Act is facilitating intervention. The propertied family was accorded a modicum of privacy with respect to public intervention by virtue of patriarchal control over the private sphere, but patriarchal power in the family in poverty was of much lesser consequence in the relationship between the family and the state. Apprenticeship legislation, guardianship legislation and poor relief legislation of the time all contained a coupling of property, patriarchy and privacy. Without property there was no patriarchal discretion to determine the child’s apprenticeship, and the child and the child’s wages become the responsibility and the property of the overseers of the poor once the family applied for poor relief.<sup>379</sup> The content of a substantive right to the guardianship of children, then – one which would be accorded full rights to patriarchal privacy – was contingent upon a propertied paternal figure.

Furthermore, the social and economic realities of the day would have meant that many families in Halifax at the end of the 19<sup>th</sup> century would have been functionally, or actually, mother-headed families, including unwed-mother-headed families. Industrial accidents causing death, “desertion”, “intemperance” and unwed-motherhood were all

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<sup>379</sup> *Of Masters, Apprentices and Servants*, SNS 1858, c 125, s 6.

realities of the time and had a substantive effect on the shape of families in poverty.<sup>380</sup> The *Prevention and Punishment of Wrongs to Children Act*, then, by default extended these very minimal rights to mother-headed households. In setting out the harms that would justify a legalized intervention into the private sphere of the family, the Act in effect set out the terms of the private sphere of the family in poverty – and in many cases, the mother-headed family in poverty. Parents – in either father-headed or mother-headed families – could retain guardianship of their children as long as they were able to financially support the children and keep them off poor relief, abstained from assaulting, “ill-using”, neglecting or treating the child with habitual cruelty, and as long as, in the course of financially supporting the children, they did not “expos[e] him or her to lead an idle or dissolute life.” For single mothers, this would have provided some protection of their tenuous right to custody of the child, but more importantly, it provided a sketch of what society would accept as the proper form of their caretaking.

These qualified protections for mother-headed families were consistent with amendments passed at the end of the century which saw even unwed mother-headed-households receiving a modicum of legalized protections. While unwed mothers had only *de facto* responsibility for their children and no legalized rights to custody under the common law,<sup>381</sup> in 1896 the Nova Scotia legislature passed Canada’s second piece of adoption legislation after New Brunswick’s 1873 Act: the *Adoption of Children Act*.<sup>382</sup> Nova Scotia’s *Adoption Act* provided unwed mothers with a modicum of protection against involuntary removal of their children. The amendment provided that no order for adoption

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<sup>380</sup> Gordon, “Single Mothers and Child Neglect”, *supra* note 68 at 176.

<sup>381</sup> Blackstone, *Commentaries*, Book 1, Chapter 16.

<sup>382</sup> SNS 1896, c9.

of an illegitimate child could be made without the mother's consent.<sup>383</sup> However, the Act also provided that the consent of the mother could be dispensed with under the following circumstances:<sup>384</sup>

- the mother is incurably insane;
- the mother is imprisoned in a penitentiary and has yet to serve three years at the time of the application;
- the mother has for two years willfully deserted or neglected to provide proper care and maintenance for the child;
- the mother has allowed the child to be supported by a charitable organization or as a pauper by the city;
- the mother has been convicted "of being a common drunkard, and neglects to provide proper care and maintenance for the child";<sup>385</sup> or
- the mother has been convicted "of being a common night walker, or a lewd, wanton and lascivious person, and neglects to provide proper care and maintenance for such child."<sup>386</sup>

Recognizing that many families in poverty were in fact mother-headed families due to unwed motherhood, desertion, death, or the out-migration of the husband, the Act, like the *Adoption Act* amendment in effect legalized the scope of responsibilities for these families.<sup>387</sup> Unlike the *Adoption Act* amendments, however, the *Prevention and Punishment of Wrongs to Children Act* did not provide the mother with any affirmative protections with respect to custody of her child. In fact, the *Prevention and Punishment of*

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<sup>383</sup> *Ibid*, s 2(1)(d).

<sup>384</sup> *Ibid*, s 3(1).

<sup>385</sup> *Ibid*, s 3(1)(e).

<sup>386</sup> *Ibid*, s 3(1)(f).

<sup>387</sup> Linda Gordon, for example, asserts that "neglect" and "single motherhood" were interdependent social problems of the time. Single mothers were so often found to be neglectful because they were establishing themselves as heads of households which seemed "reprehensible to those holding traditional views about normative family life." Gordon, "Single Mothers and Child Neglect", *supra* note 68 at 175.

*Wrongs to Children Act* evidences nothing in the way of due process rights, beyond the setting out of harms that constituted wrongs to children justifying removal.

While the new child protection legislation was written so as to provide for the legalized abrogation of “natural” parental rights to care and custody of the child, in reality, these rights for families in poverty, especially mother-headed families, were tenuous. The realities of poverty and exclusion, as well as the inevitability of the family’s regular contact with members of private charitable organizations practicing “friendly visiting”, police, stipendiary magistrates and overseers of the poor, meant there was little in the way of “family privacy” for these families. In effect, then, the Act added a new contingency upon which guardianship of children in poor families was based: the family in poverty was now required not only to ensure the physical and financial well-being of children (ie., keeping them off poor relief) but their guardianship rights were contingent upon ensuring both their actions and the actions of their children adhered to a moralized social order consistent with the philanthropic discourse of the day. A family’s rights to guardianship of the child were given a definite content: it was not just violence against the child that warranted state intervention, but also allowing a child to become truant, to use tobacco, to frequent places of ill repute, or “exposing the child to a dissolute lifestyle”. In short, guardianship of the child was premised on the ability of the family in poverty to properly socialize the child to a morally upright citizenship. The Act served to legalize and naturalize moralized views of the caretaking activity of the city’s poor, and in particular, the caretaking activity of single, or functionally single mothers.

Intervention into the poor family, however, was not just repressive. Aside from focusing society’s attention on the physical well-being of children, it also meant the deserving poor – children and “the infirm” - saw their individual social and economic positions improved. Orders to be removed from homes of impoverished and abusive families to orphan asylums – in the name of the welfare of the children -- were an



improvement on the provision of poor relief to children. Before the creation of separate asylums for children and interventions in the name of their welfare, children were either completely neglected by state intervention or received the same treatment as adults in the criminal and poor laws of the time.<sup>388</sup> So bad were conditions for children in the Poor House that in the early part of the 19<sup>th</sup> century Commissioners of the Halifax Asylum and Poor House reported that “the appearance of the majority of children kept here...[show] evidence of an unwholesome atmosphere and a degree of confinement highly injurious to them” both in terms of health and in terms of future prospects such as apprenticeships.<sup>389</sup> Children’s homes would have provided education and training for these children that, while preparing them for the low paid work of the lower classes, nonetheless would provide them with economic opportunities.<sup>390</sup>

Furthermore, as the next section will discuss, women in poverty were active participants in this philanthropic work, calling on the Society themselves and shaping the work the Society carried out in their families. However, calling on the Society came with the danger that one’s child caring would come under scrutiny and this could see the removal of the child to a home. State intervention into the private sphere of the middle and upper class families in the name of protection of women and children meant greater formal legal equality for women in propertied families. But there was not the same readjusting of legal power between husband and wife in the poor family. The child in poverty, not the mother, received the protection of domestic relations laws.

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<sup>388</sup> Rooke and Schnell, *Discarding the Asylum*, *supra* note 143 at 42.

<sup>389</sup> Cheryl Lee Des Roches Thesis, *supra* note 295 at 87.

<sup>390</sup> Fingard, *Victorian Halifax*, *supra* note 146 at 130. The next chapter will go into greater detail about the actual character of intervention with children in these homes and how this intervention also served to reproduced raced, gendered and ableist notions of propriety and best interests.

### Acting “in the Shadow of the Law”<sup>391</sup>: Daily Work of the Society

By 1882, the Society was given official legal sanction to bring cases of wrongs to children by parents, guardians, and proprietors to court. Fines collected under the Act would then be used to fund the activities of the Society.<sup>392</sup> Data from the Society’s 1884-1885 annual report indicates that the society intervened in 161 cases involving children in Halifax. The following is a breakdown of the wrongs committed against children followed by the number of children against whom these wrongs were committed:<sup>393</sup>

|   |    |
|---|----|
| Sent out begging by worthless parents   | 20 |
| Neglected by drunken father   | 42 |
| Neglected by drunken mother   | 6  |
| Neglected by others: baby-farmers (8), ill-treated by aunt (6), father (10) adoptive parents (5), strangers (6), stepmother (1), mother (3) | 39 |
| Abandoned: father (4), mother (3), mother & father (3)  | 10 |
| Persons with vicious dogs that attacked children  | 3  |
| Excessive punishment by school teacher  | 1  |
| Rescued from improper homes or company (girl under 16)  | 5  |
| Clothes provided (7), food, etc, when sick (6)  | 13 |
| Cautioned at request of parents: boys (3), girls (4)  | 7  |
| Homeless, sent to homes or institutions   | 14 |
| Reward to boy for rescuing drowning child   | 1  |

Therefore, of the 161 cases involving children, 117 of these cases were for neglect (ie., including those listed as “neglect” and those listed as “sent out begging”, and “abandoned”).<sup>394</sup> Children who were removed from the home around this time in Halifax were often sent to the country where it was said that farm work and country air would do

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<sup>391</sup> Constance Backhouse, “Divorce and Separation” in *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women’s Press, 1991) at 181. Backhouse has characterized the work that the Society undertook for women such as negotiating agreements for maintenance as acting “in the shadow of the law”.

<sup>392</sup> Section 5.

<sup>393</sup> Fingard, *Victorian Halifax*, *supra* note 146 at 176.

<sup>394</sup> *Ibid.*

them a world of good away from the unsavoury influences of the city.<sup>395</sup> While this might have been true for many children, many other accounts have indicated that children were used as low wage labour in these areas. As one account from 1870s Ontario reported, when a child welfare investigator visited a young girl who had been sent to the country to work, she told the investigator that she believed “doption sir, is when folks get a girl without wages.”<sup>396</sup> In other cases, children would be sent to the Halifax Industrial and Ragged School, the Saint Patrick’s Home for boys in 1885 and the Good Shepherd Industrial Refuge in 1890.<sup>397</sup>

In her research on the work of the Massachusetts Society for the Prevention of Cruelty to Children in Boston from the years 1880-1920, Linda Gordon found that cases of child neglect were far more prevalent in the work of the Boston Society, than cases of child abuse as we understand them today. And furthermore, families in poverty, including a large number of single mothers, were consistently overrepresented as neglectful parents.<sup>398</sup> Gordon writes:

Only one variable other than single motherhood was a better predictor of court-ordered child removal: poverty. Yet this was just another aspect of the same phenomenon, for single mothers were poorer than other parents. From 1880 to 1920, forty-four percent of single mothers were in economic deprivation, as compared to twenty-six percent of two-parent families. Only ten percent of single-mother families reached the economic level defined as competence, as compared to thirty-one percent of two-parent families. Of course, most of the MSPCC's clients were poor, not because poor people treated their children worse, but because they were more likely to be caught, and because poverty accounted for a considerable proportion of what maltreatment of children was.<sup>399</sup>

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<sup>395</sup> *Ibid* at 124.

<sup>396</sup> Craig Heron, “Review: Saving the Children” (1983) XIII.1 *Acadiensis* 168 at 174.

<sup>397</sup> Fitzner, *supra* note 138 at 44.

<sup>398</sup> Gordon, “Single Mothers and Child Neglect” *supra* note 68 at 176.

<sup>399</sup> *Ibid* at 180.

While the work of the Society in Halifax for the year between March 1884 and March 1885, does not show an overrepresentation of mothers in the list of parties that committed wrongs against children, like the cases before the Boston Society, poverty played a large role in these cases. This is not to say that families in poverty did not also mistreat their children, but as the previous section discussed, charging parents with wrongs to children in the form of physical and emotional abuse as we know them today was only part of the work conducted under the Act, and as Gordon's research reveals, comprised far fewer cases than "neglect".<sup>400</sup> While addressing the physical and emotional cruelty that many children no doubt experienced in these insecure social and economic times was an important step in protecting the interests of children, the Act and the Society that enforced the Act also changed the legal and social landscape of how families in poverty were regulated.

In fact, even though the Society pushed for legislation to prevent cruelty against children, as Judith Fingard's research has revealed, "[t]he prime function of the SPC between 1880 and 1900 was the provision of marriage counselling and legal aid for estranged couples and harassed spouses, usually at the instigation of the wife."<sup>401</sup> Urbanization, intemperance, industrialization and outmigration created a great deal of stress on the family.<sup>402</sup> Even though women in families in poverty did not have access to superior courts to advocate for the new rights to property, they used the services of the Society to advocate for themselves and to enforce their new rights even without access to the formal channels of law. A look at the records compiled by the Society for the Prevention of Cruelty in 1892, for example, gives us a small view into how the work of the Society was

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<sup>400</sup> *Ibid.*

<sup>401</sup> Fingard, *Victorian Halifax*, *supra* note 146 at 176.

<sup>402</sup> *Ibid.*

focused on acting as advocates for the women who came to them when they experienced problems with alcoholic and deserting husbands:

#5172 January 14<sup>th</sup>, 1892 Mrs. Hugh Brammey  
Reports the husband for being [a confirmed drunk] and illusing and neglecting her. Only recently he was arrested and then gave her an order to get \$10.00 out of his [omitted]. Wants separation to go to Boston to father and wants to get some support. Wrote to him to call tomorrow at 12 o'clock.

#5173 January 14<sup>th</sup> Mrs. Mary Burnett 78 Creighton Street  
Reports that her husband is drinking and has illused her and is continually threatening her.

#5177 January 25<sup>th</sup> Mrs. H. Brammey  
Made out Deed of Separation between J. Brammey and wife.

#5195 February 9<sup>th</sup> Mrs. Revelle 94 Argyle Street  
Reports her husband for being a confirmed drunkard and illusing her. Cautioned him.

#5210 March 16<sup>th</sup> Mr. Ryan Dartmouth, employed by the Halifax  
Sugar Refining Company  
Dear Sir,  
We have a man working for us called Ryan whose wife informs us that he has been illusing her, and get to length of threatening to take her life, and I am told she is so much in fear of him that yesterday she left her home taking her children with her. E. Downie.  
Wrote and cautioned him.

#5216 March 17<sup>th</sup> Mr. Ryan Dartmouth  
Employed at Halifax Sugar Refining Company. Has taken his wife home again and her 3 children and has promised to live peacefully.

#5221 March 23<sup>rd</sup> Martin Leahy 10 Jacob Street  
Mrs. Emily Leahy reports that her husband, who is a shoemaker, struck her several times with his clenched fist in the face and threatened to take her life. Her face was in a terrible state. He was not drunk at the time.

Mrs. Sarah Fisher, Mrs. Grey and Mrs. Take saw the assault.  
Issued warrant.

Thursday 24<sup>th</sup> March, Leahy was, on the intercession of his wife, ordered to pay \$3.40 and take the pledge and find bonds to keep the peace.

#5250 April 4<sup>th</sup>, 1892 Richard Fisher Atlantic St.

Mrs. Fisher reports that her husband is an habitual drunkard and lead her a miserable life. He has not been to work all the winter – he lives on his wife’s earnings, who gains her living by washing and making dresses, etc. He struck her and knocked her down on Wednesday last. Came home drunk at about 11pm. Saturday night and made trouble. Mrs. Fisher slept at her son’s house and when she went back the next morning her husband had all the doors and windows barred and would not open to her. Wishes for a separation.

#5270 May 13<sup>th</sup> Mary Anne Welsh 322 Lower Water St.  
Reports that her husband James Welsh brutally assaulted her on Wednesday night, the 11<sup>th</sup> of May. He was drunk. Both Mrs. Welsh’s eyes are black and her upper lips badly bruised [omitted].

#5274 May 17 Isaac Sampson  
Maggie Sampson reports that her husband has again deserted her and gone to his parent’s at Arichat on board of a schooner that sailed from Halifax yesterday morning. She has telegraphed to the authorities at Arichat to detain him and wants me to issue a warrant.

#5379 May 21 George Weaver 186 Lower Water Street  
Mrs. G. Weaver reports that her husband illtreated her on Wednesday last then left the house and has not returned since. He left his wife and a 5 weeks old child nothing to live on. He, George Weaver, was seen on board a steamboat this morning, but he was not there when his wife went to look for him.<sup>403</sup>

The use of temperance discourse at the time to help enforce the private provision of support from husbands (ie., the emphasis in every case on the reason for the withholding of support or the reason for abuse being the husband is a confirmed drunkard) is significant. Much of the interventionist or protectionist activity into the family at the time was justified on the basis that intemperance meant the man could no longer be trusted to undertake his common law obligations to protect the family.

In her research on the Boston Society, Linda Gordon likewise found that rather than being simply a form of social control of the lower classes, in many cases, women in

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<sup>403</sup> Records of the Society of the Prevention of Cruelty (1892) Halifax, Nova Scotia Archives (MG 20, vol 513). These notes are hand written so they are often very hard to decipher. I have tried my best to capture every word but where there is some confusion I have omitted the word.

poverty in Boston between 1880 and 1920, used the services of the Society to advocate for themselves and their children. Instead of seeing the women that called upon the Society for assistance as victims, Gordon's study shows that they "maneuvered to bring child welfare agencies into family struggles on their sides."<sup>404</sup> She writes that while there "was no Society for the Prevention of Cruelty to Women, but in fact women...were trying to turn the SPCC into just that."<sup>405</sup> Women approached the Society, sometimes as perpetrators of wrongs against children, and sometimes as victims themselves. Gordon writes that women were not mere innocents, they could shape their claims and manipulate the Society to get what they wanted. She writes: Poor women often denounced the "intervention" of outside social control agencies like the SPCCs but only when it suited them, and at other times they eagerly used and asked such agencies for help."<sup>406</sup> But overall, their interactions with the Society provide evidence that women in poverty had a profound impact on the work of the Society, both to their aid and to their detriment.

Similarly, Judith Fingard has found that while "anywhere from one-half to two-thirds of the society's cases related to the protection of children", the other half or third were largely taken up assisting women.<sup>407</sup> Data obtained by Fingard for the year 1884-1885, for example, shows that in a total of 278 cases handled by the Society that year, 161 saw the Society assisting children, 96 cases involved assistance to women and 21 cases involved assistance to men.<sup>408</sup> Fingard reports that married women often approached the society on their own initiative with two types of complaints: the first being non-support

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<sup>404</sup> Gordon, "Family Violence, Feminism and Social Control", *supra* note 43 at 472.

<sup>405</sup> *Ibid.*

<sup>406</sup> *Ibid* at 467.

<sup>407</sup> Fingard, *Victorian Halifax*, *supra* note 146 at 177.

<sup>408</sup> *Ibid* at 176.

and the second being fear of an abusive husband. Her research has revealed that overwhelmingly the majority of the cases brought before the Society on behalf of women were for non-support:

Nineteen of the 68 cases involving females, primarily mothers, recorded in the Society's records in 1897 were for non-support. In 1900, 34 of the 119 female-centered cases fell into this category. In each of these two years the non-support cases constituted the single largest category of female cases. Although physical mistreatment frequently accompanied non-support complaints, women seem to have put up with black eyes and bruises as long as they received their share of the husband's wages. It was not brutality which precipitated family crisis.<sup>409</sup>

Fingard reports that a great deal of the work undertaken by the Society in terms of its work with women was informally working out agreements between partners or enforcing support in court.<sup>410</sup> Women would approach the Society for assistance with the police magistrate to obtain separation and maintenance orders – the poor women's form of divorce. Criminal prosecution of cruelty or violence against the women themselves was not the dominating pre-occupation of the Society. Fingard reports that complaints under this Act "were frequently withdrawn before they reached the court by women worried about their husband's revenge or the interruption of their means of support" by a breadwinner being incarcerated, or out of fear that a fine levied without the family's ability to pay.<sup>411</sup> In fact, Backhouse indicates that this withdrawing of complaints of domestic violence was a common tactic for the Society in advocating for women "in the shadow of the law".<sup>412</sup> She writes that since 1879 the Society, "an all-male organization," had turned their attention to wife battering. However, even though the Society would bring charges of

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<sup>409</sup> Fingard, "The Prevention of Cruelty", *supra* note 182 at 88.

<sup>410</sup> *Ibid.*

<sup>411</sup> *Ibid* at 97.

<sup>412</sup> Backhouse, "Divorce and Separation", *supra* note 391 at 181.



abuse under the criminal law<sup>413</sup> they would use these charges as leverage with which to negotiate agreements for maintenance for women.<sup>414</sup>

Fingard's research also reveals that despite the fact that upper and middle class women, including the early "maternal feminists", were so active in the private philanthropy and temperance movement at the time, they did not play a strong direct role in the work of the Society.<sup>415</sup> While the ladies' auxiliary raised funds for the Society, the general work of the Society was undertaken by men such as Naylor and his supporters.<sup>416</sup> Furthermore, while women were active in the animal cruelty aspect of the Society, Fingard notes their absence in the activity relating to wife abuse and neglect.<sup>417</sup> She argues that the absence of middle class Halifax women in the wife abuse work may have been a reaction to what they would have seen as too radical an engagement with the family.<sup>418</sup> Fingard writes:

Their failure to extend their concern to abused wives lies partly in their milieu. In a small, still relatively close-knit community where progressive ideas caught on slowly, intervention in matrimonial matters was too radical a step for the wives and daughters of the respectable middle class. As Margaret Hunt has recently argued, the privatization of middle-class family violence rendered it "unspeakable" and condemned its witnesses to silence. That silence prevailed among female activists in Halifax.<sup>419</sup>

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<sup>413</sup> In fact, it was more likely that these charges were brought under the *Offences to the Person Act*.

<sup>414</sup> Backhouse, "Divorce and Separation", *supra* note 391 at 181.

<sup>415</sup> Fingard, *Victorian Halifax*, *supra* note 146 at 175

<sup>416</sup> Fingard, "The Prevention of Cruelty", *supra* note 182 at 87.

<sup>417</sup> *Ibid.*

<sup>418</sup> This is despite the fact that the activity of the Women's Christian Temperance Movement in Ontario, for example, at the time was directed at the twin evils of both temperance and male brutality in the home. See Backhouse, "Divorce and Separation", *supra* note 391 at 180-181.

<sup>419</sup> *Ibid.*

With the work of the Society and the introduction of the 1882 Act, we are able to see the character of intervention into the private sphere of the poor and working class family. The intervention no doubt provided important protections for vulnerable children who, unlike the women that approach the Society, could not advocate for themselves. Furthermore, unlike the formal legal system, the Society provided a modicum legal relief for women. Superior courts would have been largely inaccessible to these women. Without private means of support – such as owning one’s own home, business, or relying on one’s own wages from taking in boarders or cleaning houses,<sup>420</sup> for example, or relying on wealthier extended family members – married women’s property acts and custody acts would have done very little for them. On the other hand, the Act and the work of the Society served to bring the child caring work of families in poverty and especially mothers in poverty under greater legal and social scrutiny. The Act, its moralized set of harms justifying intervention, and the work of the Society to enforce these moralized terms, served to reinforce the view that the caretaking work of these mothers and families was largely immoral and in need of scrutiny and surveillance by upstanding outsiders.

This situation of socio-economic disadvantage would have been felt even more keenly by African-Nova Scotian women in Victorian-era Nova Scotia. Furthermore, opportunities for African-Nova Scotian women to make their own wages in the labour market were constrained at this time, their main source of wage-earning being domestic

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<sup>420</sup> It was expected that once a women was married she would leave the labour force, *infra* at 19. For a description of the type of labour that women in late-19<sup>th</sup>, early-20<sup>th</sup> century Nova Scotia would have under taken see: DA Muise, “The Industrial Context of Inequality: Female Participation in Nova Scotia’s Paid Labour Force, 1871-1921” (1991) XX.2 *Acadiensis* 3. In her article on the Jost Mission, Christina Simmons has described the importance of cleaning work to working class women who were “pushed into the labour force by their husbands’ death, disability, desertion, or unemployment”. See Christina Simmons, “Helping the Poorer Sisters”: The Women of the Jost Mission, Halifax, 1905-1945” XIV (1984) *Acadiensis* 3 at 3.

service, taking in laundry, or sewing.<sup>421</sup> African Nova Scotian women were less likely than their white counterparts to have inherited their own independent source of wealth. Furthermore, the activity of African Nova-Scotians in or out of poverty, was adjudged by white Nova Scotian society at that time to be presumptively immoral and worthy of suspicion. African Nova Scotian families at the end of the 19<sup>th</sup> century, vulnerable by reason of exclusion from social, economic and legal supports, would have experienced an even more repressive side of the moral regulation given legal credence by the Act.<sup>422</sup>

While calling on the Society for assistance may have provided a modicum of access to justice, of course, it came at great risk to mothers in poverty because they were faced with the possible removal of their children from the home. Once an order was made under the *Prevention and Punishment of Wrongs to Children Act*, children could be adopted out from the Infants Home without parental consent. Should the Society be unable to arrange a private means of support for children, an order placing them in the Infants Home could see their removal from families indefinitely. In *re Mahoney*,<sup>423</sup> the mother of two illegitimate children who were committed to the Halifax Infants' Home brought an application for *habeas corpus* after the children were removed from the Home to the United States.

In *re Mahoney* it is difficult to determine the exact facts that led to the children being removed from their mothers' care to the Infants' Home. The following facts are provided:

On the 8th June, 1885, Ellen McKenzie was convicted before Henry Pryor, Esq., Stipendiary Magistrate of the city of Halifax, for neglecting and illusing her two

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<sup>421</sup> Morton, "Separate Spheres" *supra* note 317 at 67. Fingard's research has also indicated a higher prevalence of African Nova Scotian prostitutes at this time relative to the size of the community due to constrained opportunities in the private labour market. See Fingard, *Victorian Halifax*, *supra* note 146 at 105.

<sup>422</sup> *Ibid* at 69.

<sup>423</sup> (1892) 24 NSR 86.

infant children, Jerry and John Mahoney, (illegitimate), under the age of three years, and, it appearing that the children were suffered to grow up in circumstances exposing them to lead a dissolute life, it was adjudged that the mother be deprived of the custody of the children, and that they be committed to the Halifax Infants' Home, subject to the rules, regulations and discipline of that institution. The children were sent to the home on the same day.

On the 31st May, 1889, a writ of *habeas corpus* was allowed, on the application of the guardians of the two children, directed to the matron of the home and the chairman of the advisory committee requiring them to have the bodies of the children before the court.

A return and amended return were made to the effect that the children, being of suitable age, were placed with fit and proper persons, who undertook to give them homes; that one of the children had been removed to the United States of America, out of the jurisdiction of the court, and that, after enquiry, it had been found impossible to ascertain where the other was at the date of the issue of the writ, or since.<sup>424</sup>

It appears from these facts that this single mother was convicted on the basis of suffering her children to “grow up in circumstances exposing them to lead a dissolute life.”<sup>425</sup> There was great concern at this time about the immoral conduct of poor and working class women and ridding the city of prostitution was a particular focus at this time.<sup>426</sup> The very fact that this single mother had two children under the age of 3 in itself means that her sexuality would have been offensive to a conservative moral and religious society of the time, but whether she also worked as a prostitute or was known by her neighbours to be “intemperate”, we don't know.

What is important about the case is that it shows that a stipendiary magistrate of the time – that is, a low-level municipal court judge who would hear minor civil and criminal offences – could make an order on ill-defined grounds and forever remove two

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<sup>424</sup> *Ibid* at 86.

<sup>425</sup> *Ibid* at 87. Without the exact facts of the case we cannot know what comprises a “dissolute” life, but it would be one which calls into question the morals of the mother.

<sup>426</sup> Fingard, “The Prevention of Cruelty”, *supra* note 182 at 96.

children from the custody of their mother, all in one day. It appears that in the four years from the time the mother was originally convicted and the children sent to the home, to the date of the *habeas corpus* application, two men – Frederick McKenzie and Charles W. McGinn – had applied to Supreme Court and were awarded custody of the children.<sup>427</sup> While the case does not indicate who these men are, it is safe to assume that at least Frederick McKenzie was a relation, although presumably not the husband, of Ellen McKenzie. The men brought the application for *habeas corpus* against the Infants' Home but the children had already been removed to the United States.

In dismissing the *habeas corpus* application the Court held that, once the children were removed to the Infants' Home, the home had sole guardianship over the children and could dispose of their custody as it wished. The rules and regulations of the Home provided that it would look after the children while they were of tender years (approximately 7 years old) but that after that it would find fit and proper persons to give them a home. Once the Home handed over the children to such “fit and proper persons,” the Home no longer had any responsibility to them.<sup>428</sup> In this case the Court found that there was no reason why the Home couldn't send the children to live in the United States. The Court also found that once the Home handed the children over to such “fit and proper persons” it had no obligation to make further enquiries into the whereabouts or welfare of the children. By the time of the *habeas corpus* application, it was asserted by the Home that it was impossible to ascertain the exact whereabouts of the children.

We see here the extent of the power of the legalized intervention into the family in poverty, yet with little actual legal protections. The only intervention of the courts in removing these children from the care of their mother and their removal to the United

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<sup>427</sup> *Ibid.*

<sup>428</sup> *Ibid* at 88.

States would have been the hearing in front of the stipendiary magistrate for Halifax. It appears as if the hearing was confined to a single day (or less) and it is not known if the mother was represented by counsel. On the other hand, the Home would have been able to determine the fate of these children absolutely. There was no hearing which determined whether the parents and guardians in the United States were “fit and proper persons” but only the discretion of the Infants’ Home. Once the Home had done its job of finding these persons and handing over the children, it no longer had any obligation to the children, the biological mother, or indeed, the adopted parents.<sup>429</sup>

Further, the focus of the Society on the child and on passing legislation to protect the child facilitated the shifting goals of the *Poor Law* – focus on the deserving poor and state support for specialized institutions for the deserving. It permitted state intervention into the poor family without the necessity of the state taking responsibility for the family as a whole. A focus on the legalized abrogation of “natural” or de facto guardianship rights of parents in the 1882 Act gave the impression – not necessarily a reality – of a private sphere accorded poor families, for example, poor, illegitimate, single-mother headed families such as Ms. McKenzie’s.

Without financial support or the challenging of patriarchal power within the home, however, this “private” sphere would have been largely illusory, providing women in poverty with few choices and an incredible amount of responsibility. Even where a mother did not turn to poor relief to assist in taking care of her child (and having herself and her child removed to the poor house), if it was deemed that her means or her child’s means of making a living promoted vagrancy, either her or her child or both would find themselves imprisoned under vagrancy laws. And finally, if she resorted to voluntarily placing her child with the city’s child caring agencies, now the *Prevention and Punishment of Wrongs*

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<sup>429</sup> *Ibid.*

*to Children Act* provided that she would lose guardianship of her child in any event. Not only would women in poor families be responsible to navigate patriarchal relations in the home, but now they were subject to a repressive legal and social order which brought their caretaking under suspicion with grave consequence. While family law reforms at the end of the century saw legislated incursions on absolute patriarchal power in the family, for women in poverty this meant shouldering a great deal of social responsibility without the same promise of formal legal protections accorded to women in propertied families.

### **Conclusion**

The end of the 19<sup>th</sup> century was a time in which the contours of the state were being reconceived and redrawn in Nova Scotia. The social problems created by industrialization, out-migration, urbanization and economic depression at the end of the century required a more active state response. Maternalists, suffragists, child savers, industrialists, workers, temperance movement and religious leaders all influenced the form this response took. With more active state intervention, however, came a necessary redrawing of the boundaries between the public and the private. Industrialization, for example, required state intervention in the form of legal, financial and physical infrastructure, as well as the passing of worker protection legislation. But it was not only the boundary between the public sphere of the state and the private sphere of the market that was being redrawn, but the boundary between the family and the state was being reconceptualised, as well. The Victorian family, suffused with patriarchal discretion and maintained by the boundaries of the common law, was unable to accommodate the needs of all its members and indeed, the needs of society in these changing social, economic and political times.

At the end of the 19<sup>th</sup> century there was a proliferation of legislation creating distinct legal persons of wives and children. Childhood as a distinct sphere was delimited

legally by hours of work legislation, factory acts and mines acts which set maximum age requirements for children. Compulsory education acts were passed which mandated the attendance of children between the ages of 8 and 14 in either public or private education institutions. The creation of the legal category of the “child” allowed for the state to enter into the family and adjudicate upon parental caregiving like never before. The end of the 19<sup>th</sup> century saw a legislated intervention into the guardianship rights of parents, establishing that children were not to be seen as chattels but parents were expected to act as trustees for the welfare of their children. This focus on the welfare of the child at the end of the 19<sup>th</sup> century facilitated a scrutiny by the courts and the Society of the relationships within common law family as never before.<sup>430</sup>

At the same time, a great deal of legislation was passed which changed the position of women – suffrage legislation, married women’s property legislation, as well as adoption and custody legislation, giving women rights to custody, support and a regime of separate property. In fact, the passing of custody laws which allowed judges to make orders in the welfare of the child served to improve women’s positions in the private sphere of the family by giving them the right to apply for custody of their children and for maintenance of these children. Through changes to custody law, courts began adjudicating on a father’s right to custody of his child. With the legal diminution of paternal authority in the common law family, there was a shift towards greater state intervention in the family. For women who could support themselves and their children financially, either with their own real or personal property, wages and/or businesses, with assistance from maintenance and alimony payments, or extended family, these legalized adjustments promised a modicum of legal protection for the autonomy of functionally mother-headed families.

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<sup>430</sup> Backhouse, “Shifting Patterns”, *supra* note 156 at 213.



Legislated interventions on behalf of the welfare of the child did not result in the same transfer of power for women in poverty, however. The proliferation of domestic relations laws targeted to protecting children from cruelty and preventing their vagrancy had a greater impact than matrimonial property or custody law reforms on the lives of women in poverty. Beyond the minimal protections provided in the *Adoption Act*, these domestic relations laws did not serve to improve the positions of marginalized women with regard to the custody and support of their children.

While the *Prevention and Punishment of Wrongs to Children Act*, and the activity of the Society for the Prevention of Cruelty was no doubt successful in improving the situation of many children in the city of Halifax at the end of the 19<sup>th</sup> century, the Society and its new Act also served to delineate the private sphere of the family in poverty and the basis on which that sphere would be traversed. With the passing of the Act, the family's right to guardianship of the child was contingent: it was not just violence against the child that would see the abrogation of rights to guardianship, but also allowing a child to become truant, to use tobacco, to frequent places of ill repute, and "exposing the child to a dissolute lifestyle". While under the *Poor Law* fathers who allowed their families to fall on poor relief lost the ability to direct the care of their children (and to benefit from their wages), now a new contingency was added to the guardianship rights of parents in poverty. Now, failure to properly socialize the child to a morally upright citizenship would see parents lose the right of care and custody their children.

While the new child protection legislation provided for the legalized abrogation of "natural" parental rights, in reality, these rights to guardianship for families in poverty were tenuous. The family in poverty was regulated by a myriad of public laws, criminal, vagrancy laws and the laws of poor relief which would render their right to guardianship of their children moot. The custodial rights of single (and functionally single) mothers and especially unwed mothers were uncertain and not until 1896 did they even receive minimal

protections against the non-consensual adoption of their children. Furthermore, left with few choices, many families would have voluntarily handed their children over to homes that took responsibility for their care. The *Prevention and Punishment of Wrongs to Children Act*, then, served to erect a legalized private sphere around the family in poverty as much as it set out the terms of when and how the boundaries of this sphere would be traversed. Furthermore, placing responsibility for social order within the private sphere of the family created the illusion that these parents could control the socio-economic problems that faced their children. In this sense the legalized intervention into the private guardianship rights of parents served to responsabilize parents in poverty individually for the social problems facing their families.

The legislation affecting poor families was not introduced to improve or protect the position of women, but only of children. Children were the members for which Nova Scotians were willing to take financial responsibility, but not women in poverty, who were seen as idle, loose and dependent according to the pauperist discourse of the day. As a result, women in poor families who wished to keep their families together were left to ensure not just the financial support of children and the presence of a paternal head in the family, but now their childrearing was presumptively under suspicion. Family autonomy was synonymous with the ability to ensure their children adhered to a particular social order. Furthermore, while the Act served by way of legislation to abrogate the father's patriarchal right to use force against his child in the home, no such abrogation was provided of his right to use force against his wife. Women in poverty were positioned at the boundary of patriarchal privacy and public intervention; attempting to negotiate both patriarchal power and the moral scrutiny of outside agents in the home.

As Judith Fingard's work has shown, however, women in poverty were not total victims of repressive state and patriarchal power as they were able to draw upon the slim resources available to craft rights and access to justice for themselves. Fingard's findings

on the use that mothers in poverty made of the Society for the Prevention of Cruelty is consistent with research conducted by Linda Gordon in Massachusetts. In her study on the history of the Massachusetts Society for the Prevention of Cruelty Gordon found that far from being a mechanism of social control, women utilized the services of the Society to their advantage and to the advantage of their children. As Gordon writes, while there was no Society for the Prevention of Cruelty to Women, women who called on the Society for assistance attempted to create one.<sup>431</sup> Furthermore, Gordon argues that much of the child protection that ensued after the creation of the fledgling Boston Society was influenced by this activity of mothers in poverty advocating for themselves and their children.<sup>432</sup>

Although women in poverty were able to effect a modicum of access to justice for themselves, however, this was done in the shadow of the law. Women in poverty were required to call upon the assistance of the Society to negotiate informal agreements, for example, which required their dropping assault charges and, given their lack of access to justice in the first place, held little chance of enforcement by law. Furthermore, calling on the Society for assistance came at a great risk to mothers who could see the loss of custody of their children. Overall, family law reforms at the end of the 19<sup>th</sup> century saw a legalized intervention into both poor and propertied families and a displacing of absolute patriarchal power to solve larger social problems. However, this legalized intervention saw women in poverty shouldering a great deal of social responsibility without the same promise of formal equality accorded to women in propertied families. While it can be argued that this risk to mothers was justified on the basis that it improved the well-being of children in poverty, it is not clear that the end result of the intervention of the Society

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<sup>431</sup> Gordon, “Family Violence, Feminism and Social Control”, *supra* note 43 at 472.

<sup>432</sup> *Ibid* at 475.

was always in the best interests of these children. As I will show in the next chapter, the institutionalization of children in reformatories and Homes came with its own dangers.

## Chapter 3:

### 1908-1940s: The Rise of Delinquency, the Normal Child and Socializing Justice in Nova Scotia

Its purpose is to help all it can, and to hurt as little as it can; it seeks to build character - to make good citizens rather than useless criminals. The state is thus helping itself as well as the child, for the good of the child is the good of the state.<sup>433</sup>

The development of the *Prevention and Punishment of Wrongs to Children Act* and the regime that policed and enforced the Act, were part of a strategy by both state and non-state actors, not just of protection for children, but of the proper way to govern the poor in general. In this chapter I will investigate another shift that occurred in the provision of protective services to children in the early 20<sup>th</sup> century: the development of the Juvenile Delinquents regime, including the juvenile court and the office of the Superintendent of Neglected and Delinquent Children.

In the early 20<sup>th</sup> century, concern about cruelty to children began to be articulated more in terms of prevention and remediation of delinquency and neglect than prevention of cruelty. The Society for the Prevention of Cruelty, denominational institutions, probation officers and police formed an important part of this new regime. As well, a new juvenile court and Superintendent of Neglected and Delinquent Children were created in 1911, which would come to dominate child welfare work in Halifax and the province as whole by the 1920s. This shift was not just an organizational shift, however, but an important shift in the way that protection of children was conceptualized. With the creation of the concept of the “juvenile delinquent” and probationary/reformatory courts, cruelty to children was no longer dominated by the ideas and practices of amateur philanthropists. New actors and ideas emerged as a professionalizing cadre of psychiatrists and social workers and a “socialized” court came onto the scene. While Victorian cruelty

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<sup>433</sup> Julian W Mack, “The Juvenile court” (1909-1910) 23 Harv LR 104 at 121 – 122.

to children discourse was still present, the rise of the juvenile delinquents regime and specialized actors and institutions within this regime changed the way the intervention with children was conceptualized and carried out.

With the development of a regime of juvenile delinquency we see a concern for cruelty to children shift more to a concern with children *as* delinquents. Foucauldian scholars have shown us how the concept of delinquent is significant. It marks a shift from focusing on the acts committed by the criminal, to a focus on abnormality; on using the knowledge of the human services to assess and work with the delinquent, setting out how the delinquent deviates from the norm, and working with the delinquent to bring him or her back in line with the norm.<sup>434</sup> An examination of the early emergence of the juvenile delinquent regime in Nova Scotia gives us a view of how interventions on behalf of both state and non-state actors in the child protection regime were undertaken in the name of shaping future citizens of tomorrow. In other words, rather than just being a way to care for the children of the poor, Nova Scotia's child protection regime in the early 20<sup>th</sup> century was self-consciously shaping these children in the interests of governance and society at large.

In this chapter I will show how law and psychiatry worked together to function in a new way to carry out child protection work. In this era we see the beginnings of the rise of the socializing justice and the medicalization of delinquency and neglect. This medicalization was necessary to carry out the purposes of the child welfare system in the early part of the 20<sup>th</sup> century – the proper reform and socialization of children and turning them into upstanding citizens. Therefore, law and psychiatry were performing an essentially political role – they were working together to set out the terms of the “proper

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<sup>434</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York, Pantheon Books, 1977); Donzelot, *Policing of Families*, *supra* note 13.

citizen”. We see the doctors and psychiatrists attached to the Court or working in the institutions to which children were sent, acting as “technician[s] of social order.”<sup>435</sup> The proper citizen was a civilized, able-bodied, white, middle-class boy or girl acting out appropriate gender roles in a sexually appropriate manner. The children that did not fit within this model were labelled abnormal and the medical, as well as denominational, regimes were brought to bear on their reform.

The emergence of juvenile delinquency and the capturing of the child welfare apparatus by the juvenile delinquency regime developed in an era of institutionalization and denominationalism. The fact of Nova Scotia’s child protection regime remaining so centered on institutions as opposed to foster care even into the middle of the 20<sup>th</sup> century is significant in and of itself. Renée Lafferty has written that the processes of reform occurring in child welfare work elsewhere in Canada happened quite slowly in Nova Scotia.<sup>436</sup> While advocates such as J.J. Kelso in Ontario were already calling for de-institutionalization and removal of children to foster homes by the 1920s, Nova Scotia was still creating institutions— most infamously, the Indian Residential School at Shubenacadie and the Home for Colored Children. While de-institutionalization was accepted as the modern and progressive method for working with children as we moved into the second decade of the 20<sup>th</sup> century, Nova Scotia’s child welfare regime still very much relied upon and hailed the virtues of its institutions. Lafferty, for example, has written on the importance to the province of the denominational nature of the institutions and how this coincided with the value and central place that Nova Scotians had long placed on religious institutions in the Province.<sup>437</sup>

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<sup>435</sup> See Rose, “Psychiatry as a Political Science”, *supra* note 85 at 6.

<sup>436</sup> Renée Nicole Lafferty, *The Guardianship of Best Interests: Institutional Care for the Children of the Poor in Halifax, 1850-1960* (Montreal: McGill-Queen’s University Press, 2012).

<sup>437</sup> *Ibid.*

The continued institutionalization of children into the middle of the 20<sup>th</sup> century not only gives us a strong documentary record of how this work was undertaken, but it also marks an active intervention with children on behalf of human services and denominational personnel that could not have been accomplished in foster families, for example. The resources available in Nova Scotia in the early years of the 20<sup>th</sup> century would not have provided for the home visits and active regulation of families that would be required in the years after de-institutionalization occurred mid-century. Social work had not yet become a professional field in the early years of the juvenile delinquent regime in Nova Scotia. Therefore a survey of the work done with children in the institutions gives us an early view of how work by human services professionals would look in families in the years after de-institutionalization (see Chapter 4).

Furthermore, this era also shows us how work with children at this time was capable of satisfying the interests of statistics and demographic data so popular in this era. With large populations of children at hand for which data could be easily collected, knowledge about children and their proper socialization could be compiled in ways that fostering and adoption services could not accommodate. Psychiatrists and doctors were called in to work with children in the institutions – not conducting therapy with them, but using the whole population of institutionalized children to develop statistical models of prevalence, to classify the children and to set out the appropriate interventions for reform (ie., job skills) based upon this classification. As historians of psychiatry have shown us, asylums and institutions in the 19<sup>th</sup> and early 20<sup>th</sup> century became important sources of early psychiatric knowledge.<sup>438</sup> Similarly, Nova Scotia's child caring institutions were an important source of child development knowledge.

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<sup>438</sup> See Nikolas Rose, "Psychiatry as a Political Science: Advanced Liberalism and the Administration of Risk" (1996) 9.2 *Hist of Human Sci* 1; Robert Castel, "From Dangerousness to Risk" in G Burchell, C Gordon and P Miller, eds, *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991) at 281.



Increased focus on science in the institutions, however, coincided with another more disturbing use that was made of science by governments and policy at this time. Knowledge about the proper reform and socialization of children was also influenced in the early decades of the 20<sup>th</sup> century by an emerging social Darwinist school of thought and eugenic theories, particularly as far as “feeble-minded” persons were concerned.<sup>439</sup> These ostensibly “scientific” theories about individual deficiency helped to provide explanations for social inequality that did not require a re-ordering of overarching social and economic conditions. This medicalized school of thought in the institutions assisted in characterizing children as normal or abnormal, but it also provided an explanatory framework for the wider social and economic problems that resulted in the marginalized positions of these children.

The chapter will finish by showing how the development of the juvenile court, with its absence of due process rights characteristic of all lower courts at the time, helped to facilitate the use of these scientific categories in legal decision-making. The role the juvenile court played in this regime was not a liberal one. It did not act to protect the individual rights of these children or their families. Rather, the role of the juvenile court was to legitimize this new role for the child welfare regime and the role of the medical and denominational personnel who carried out this work. The juvenile court was a site for “socializing justice”; a shift in legal regulation which occurred in the early decades of the 20<sup>th</sup> century to facilitate the rise of what Jacques Donzelot referred to as the “social” sector. The legal concept of the juvenile delinquent, and the reports of the juvenile court which evidence how the juvenile court judge adjudicated upon this concept became an important means for disseminating and deploying the medical and psychiatric ideas from the juvenile delinquent regime, not only on poor children and their families, but on society as a whole.

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<sup>439</sup> Angus McLaren, *Our Own Master Race: Eugenics in Canada, 1885-1945* (Toronto: Oxford University Press, 1990).

Furthermore, there was little recognition of family autonomy in the reports of the juvenile court judge. This was an era concerned with the proper socialization of the individual child and as such, decisions were made wholly on an evaluation of the best interests of children, variously set out in a religious, and then medicalized, discourse. In this era, state and non-state actors saw the proper socialization and reform of children from the lower classes as a legitimate public responsibility.<sup>440</sup> While the Victorian child was an innocent, the child in juvenile delinquent system was either himself “delinquent” or potentially so, ie., “neglected”. The delinquent was a threat to the social order and the system was focused on reforming the child, not only in his or her own best interests but in the best interests of society as a whole.

Finally, I will argue that relegating legal oversight of the juvenile delinquents system to lower courts which did not secure nor even prioritize the due process rights of children and families – indeed some judges such as Ernest Blois was not even legally trained – was likewise a strategy of power to undermine family autonomy. This is best exemplified when we compare the jurisprudence emanating from the Supreme Court with that of the juvenile court. Despite the fact that the families involved in the juvenile delinquent system were marginalized by social and economic marginalization, they were still able to bring appeals of juvenile court decisions to the Supreme Court. Between 1926 and 1940 the Supreme Court of Nova Scotia overturned a number of rulings of the juvenile courts on the basis that the court had failed to protect the liberty interests of children and families. Interestingly, just as the Supreme Court was beginning to issue judgments challenging the procedures and decisions of the juvenile court under the *Liberty of the*

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<sup>440</sup> Susan E Houston, “The ‘Waifs and Strays’ of a Late Victorian City: Juvenile Delinquents in Toronto” in Joy Parr ed, *Childhood and Family in Canadian History* (Toronto: McClelland & Stewart, 1982) 129 at 130.

*Subject Act*,<sup>441</sup> the juvenile court reports became merely statistical – gone were the very transparent elaborations on process, ideology and method. By 1926, those families that had access to the Supreme Court found their due process rights affirmed and the interventions of the juvenile delinquent regime brought at least to some extent in line with a liberal legalist framework. We can see then, that, a lack of access to justice was a particularly effective means of carrying out this “socialized justice,” by relegating families in poverty to lower courts without the due process protections found in the Superior Courts.

### **The Juvenile Delinquents Act, 1908, the Children’s Protection Act, 1912 and the Creation of the Juvenile Courts**

The first uniquely “Nova Scotian” Act and the Act that would come to have the longest-lasting effect on child protection law in the early years was the *Children’s Protection Act, 1912*.<sup>442</sup> Up until this time Nova Scotia had introduced two Acts that were based on outside precedents and were amended very shortly after their introduction. In 1882, as I detailed in Chapter 2, the Society for the Prevention of Cruelty (the “Society”) was successful in lobbying government to introduce the *Prevention and Punishment of Wrongs to Children Act* (the “1882 Act”)– an Act borrowed from the New York Society. And then in 1906 adherents to the philosophies of John J. Kelso, the father of the Children’s Aid Society movement and first superintendent of neglected and dependent children in Ontario, were successful in advocating for the passing of the *Children’s*

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<sup>441</sup> *Liberty of the Subject Act* RSNS 1923, c 231.

<sup>442</sup> *An Act to Consolidate and Amend the Law Relating to Juvenile Offenders and the Protection Of Children*, SNS 1912, c 4.

*Protection Act, 1906*<sup>443</sup> (the “1906 Act”) and in creating the first – although short-lived – Children’s Aid Societies in Nova Scotia.<sup>444</sup>

The 1906 Act expanded upon the grounds of cruelty<sup>445</sup> contained in the 1882 Act and set out in basic form the role of the Children’s Aid Society. The Act provided that if a

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<sup>443</sup> *An Act for the Protection and Reformation of Neglected Children*, SNS 1906, c 54 and c 55.

<sup>444</sup> It is unknown why the CAS in Halifax at first lasted only a short period, essentially disbanding in 1909 after having successfully opening a hospital for children. Although it is suggested that there had been struggles between the CAS and the Society for the Prevention of Cruelty, with the Society ultimately winning out until the establishment of the Juvenile courts and the close connection established between the Juvenile courts and the CAS in the *Children’s Protection Act, 1912*. It would not be until 1920 when a Children’s Aid Society would be established for Halifax, replacing the Society for the Prevention of Cruelty. Fitzner, *supra* note 138 at 49-50; Beverly MacDonald Dubinsky, *Rescued: Early Child Protection Legislation in Nova Scotia* (MSW Thesis, Dalhousie University, Maritime School of Social Work, 1995) [unpublished] at 48.

<sup>445</sup> These grounds would be reproduced in the *Children’s Protection Act, 1912*, s 17:

- (a) Who is found begging or receiving alms, or thieving in any place whatsoever, or being in any shop, saloon, tavern or other places where liquor is sold, or sleeping in open air, [emphasis added]
- (b) Who is found wandering about late hours and not having any home or settled place of abode or proper guardianship;
- (c) Who is found associating or dwelling with a thief, habitual drunkard or vagrant, or who by reason of the neglect or drunkenness or other vices of its parent or guardian is suffered to be growing up without salutary parental control and education, or in circumstances exposing such child to lead an idle or dissolute life;
- (d) Who is found in any house of ill fame or in the company of a reputed prostitute;
- (e) Who is found destitute, being an orphan or deserted by its parents, or having a surviving parent who is undergoing imprisonment for a crime;
- (f) Who patronizes or habitually visits any saloon, shop or other place where intoxicating liquors are sold, or who patronizes or habitually visits any public pool room or gambling house;
- (g) Who habitually uses obscene, profane or indecent language, or is guilty of immoral conduct in any public place or in or about any school house;
- (h) Who is found after the hour of eight o’clock at night in any moving picture theatre, vaudeville entertainment or theatre of any kind, not accompanied by his parent or guardian or by some person with the consent of such parent or guardian;
- (i) Who is found after the hour of eight o’clock at night loitering about a place of entertainment and does not give satisfactory account of himself;
- (j) Is an habitual truant and whose parent or teacher represents that he is beyond control;
- (k) Who is employed in any brewery or any shop, saloon, tavern or other place where intoxicating liquors are made, bottled or sold;
- (l) Who habitually uses obscene, profane or indecent language, or is guilty of immoral conduct in any place whatsoever;
- (m) Who has been unlawfully assaulted or beaten by its parent, or is ill-used or treated with habitual cruelty and neglect by its parent or by the person with whom it resides;
- (n) Who commits any offence punishable with fine or imprisonment or both.

child brought before the court is not found to fit under one of the enumerated grounds constituting a neglected child, and there is “good ground” to believe that the child is guilty of violating any provision of the *Criminal Code of Canada*,<sup>446</sup> the judge may prosecute the child under the criminal code and may sentence the child to be committed to an orphan asylum, industrial school or other institution for the care of children.<sup>447</sup> The inclusion of this early precursor to the 1908 *Juvenile Delinquents Act*<sup>448</sup> (“1908 JDA”) was indicative of the link between the notion of “juvenile delinquents” and the “neglected child” by the beginning of the 20<sup>th</sup> century. Nova Scotia’s first piece of “juvenile delinquency” legislation had appeared in 1890<sup>449</sup>, however, it did not institute a systematic regime for the treatment of offenders but merely diverted young offenders from county jails to reformatories. It wasn’t until shortly after the passing of the 1906 Act that a more comprehensive regime regulating juvenile delinquency would be instituted in Nova Scotia.

The new, federally enacted 1908 JDA was premised on the notion that youth criminal justice should be focused on rescuing children from crime as opposed to putting them through a formal criminal trial and convicting them.<sup>450</sup> Treatment, as opposed to punishment, was meant to be the central focus of juvenile courts. The Preamble to the Act provided,

Whereas it is inexpedient that youthful offenders should be classed or dealt with as ordinary criminals, the welfare of the community demanding that they should on the contrary be guarded against association with crime and criminals, and should

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<sup>446</sup> RSC 1906, c 146.

<sup>447</sup> Section 8(3).

<sup>448</sup> SC 1908, c 40.

<sup>449</sup> *The Act to Provide for the Reform of Juvenile Offenders*, SNS 1890.

<sup>450</sup> Joan Sangster, *Girl Trouble: Female Delinquency in English Canada* (Toronto: Between the Lines, 2002) at 15.

be subjected to such wise care, treatment and control as will tend to check their evil tendencies and to strengthen their better instincts.

The 1908 JDA applied to children under the age of 16 who violated a provision of the *Criminal Code*, any federal or provincial statute, or any by-law or ordinance of a municipality.<sup>451</sup> The Act created a juvenile court and mandated closed hearings for delinquents and banned the press from publishing information about those who were charged and “convicted”.<sup>452</sup> Pursuant to the Act, all trials were to be of a summary nature before a juvenile court judge.<sup>453</sup> The 1908 JDA specifically provided that trials of juveniles may be “as informal as the circumstances will permit, consistently with a due regard for the proper administration of justice.”<sup>454</sup> As will be discussed, the juvenile court in Halifax was often little concerned with due process and usually juvenile offenders were not even represented by counsel. The families of juvenile offenders, however, were encouraged to participate in proceedings and the Act mandated that notice of a hearing of a charge of delinquency had to be served on a parent or guardian of a child.<sup>455</sup> A probation officer was attached to the juvenile court in Halifax<sup>456</sup> and indeed, the reports of the juvenile court judges indicate that probation and the reform of the child through sentencing to an institution for the purposes of learning a trade were the main focus of the court. Children were no longer to be incarcerated with adults, even if they were being held awaiting trial.<sup>457</sup>

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<sup>451</sup> Section 2.

<sup>452</sup> Section 10.

<sup>453</sup> Section 5.

<sup>454</sup> Section 14.

<sup>455</sup> Section 8.

<sup>456</sup> In 1912 Ernest Blois, the first Superintendent of Neglected and Dependent Children was simultaneously appointed as the Probation Officer for the juvenile court of Halifax.

<sup>457</sup> Sections 11 and 12.

A child who was found to be a juvenile delinquent could be committed to an industrial school, a refuge for girls, or to the care of the probation officer attached to the court or some other person, including to the care of the children's aid society, who would then place the child, either in foster homes where available, or in many instances, in a child caring institution in Halifax.<sup>458</sup> Children could also remain in their home and be visited by the Probation Officer in the home. The Act provided that the Court was to make an order as to the settlement of the child, upon the child being ordered to the care of the superintendent of neglected and dependent children, probation officer or children's aid society. If the parents could financially provide for the child, then the father would be ordered to pay for the child and if the child was found to be a pauper then costs would be ordered to be paid by the municipality in which the child was determined to have settlement.<sup>459</sup> The Act provided for the child to be returned for a review after being placed.<sup>460</sup> A review was to be conducted in an even less formal manner than the original hearing, and could be dealt with on the report of the probation officer, the secretary of the CAS or the Superintendent of Neglected and Dependent Children, or the superintendent of the industrial school.<sup>461</sup> The Act provided that in every case the Judge shall make an order "which the court is of opinion the child's own good and the best interests of the community require."<sup>462</sup>

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<sup>458</sup> Section 16.

<sup>459</sup> Section 16(2).

<sup>460</sup> Section 16(4).

<sup>461</sup> Section 16(4).

<sup>462</sup> Section 16(5).

The 1908 JDA was introduced to the House of Commons by a senator from Ontario. The Senator's son was head of the Ottawa CAS and a leading child saving advocate<sup>463</sup> and heavily influenced by Kelso – a symbol of the intertwined nature of child protection and youth justice work for the decades to come. Kelso espoused the values inherent in the maternalist ideology of the time and advocated for women remaining in the home and raising children in order to prevent these children from falling into a life of juvenile delinquency.<sup>464</sup> He was an early proponent of a more reform minded intervention with poor families as a way to ameliorate their poverty, as opposed to just the provision of charitable relief.<sup>465</sup> Kelso is quoted as having said:

It is absolutely useless to give families temporary relief when there are certain conditions that keep them down and make it impossible for them to become self-supporting. Improved laws, clean, healthy and remunerative employment, decent and sanitary homes, moral instruction and play facilities for children, are what the poor need far more than alms.<sup>466</sup>

Kelso advocated that the provision of temporary relief would create dependency and result in “professional pauperism”.<sup>467</sup> He argued that “pauperism is hereditary. Children are quick to learn that it is easier to beg than to work and they grow up to continue the same vicious life as their parents.”<sup>468</sup> In order to stop hereditary pauperism Kelso developed a maternalist discourse in his thinking that placed the mother squarely at the center of a morally upright family.

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<sup>463</sup> Sangster, *Girl Trouble*, *supra* note 450 at 14.

<sup>464</sup> Jones and Rutman, *In the Children's Aid*, *supra* note 143 at 133.

<sup>465</sup> *Ibid* at 135.

<sup>466</sup> *Ibid*.

<sup>467</sup> *Ibid* at 128.

<sup>468</sup> *Ibid*.



Kelso's maternalist focus on the proper upbringing of children appealed to the sensibilities of women social reformers at the time. The central place of upright, Christian motherhood in keeping a proper home and raising respectable children also corresponded with the work these women were doing with the temperance movement. Intemperance and pauperism were problems perpetuated by men – it was up to the wives of these men to secure the home front as a Christian and moral place for their children to grow up. Kelso's belief, therefore, was that child welfare was essential not only for the welfare of the poor, but also for the maintenance of a moral order in society and the prevention of juvenile delinquency.

What is apparent when looking at both juvenile delinquency and child protection in the first half of the 20<sup>th</sup> century, is that there is very little distinction between the child as “juvenile delinquent” and the “neglected child”. A juvenile delinquent was a child who had actually been found guilty of having committed a crime – or rather, given the informal procedures of the Juvenile court, only accused of having committed a crime. A neglected child was one who had not been accused of committing a crime, but nonetheless was found in circumstances which were immoral or unfit – circumstances that would eventually give rise to criminality. Once the juvenile delinquent was placed with the Society, child caring institution or the Superintendent, the child would then come under provincial jurisdiction and be dealt with by child protection legislation.<sup>469</sup> Furthermore, child neglect cases – that is, where a child had not necessarily committed an offence under the criminal code – began to be heard by juvenile court judges once a juvenile court was established in Halifax in 1911.<sup>470</sup>

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<sup>469</sup> Section 17.

<sup>470</sup> The Juvenile court in Halifax was created by the passing of *An Act to Establish a Juvenile court in the Province of Nova Scotia*, SNS 1910, c 8.

The close connection between the concepts of juvenile delinquent and neglected child continued to be reinforced by the legal system with the introduction of the *Children's Protection Act*<sup>471</sup> in 1912 (the "1912 Act"). The 1912 Act incorporated the 1908 JDA and tailored it to Nova Scotia's particular situation – further organizing the children's aid societies, creating a juvenile court for Halifax and the position of the Superintendent of Neglected and Delinquent Children for Nova Scotia. The 1912 Act provided that where a child was not a neglected child they would be found to be a juvenile delinquent if they violated a provision of the *Criminal Code*.<sup>472</sup> However, most interesting is that the 1912 Act allowed the juvenile court judge to sentence a neglected child to time at a reformatory<sup>473</sup> – a further blurring of the lines between juvenile delinquent and neglected child.

The 1912 Act clarified the duties of the Superintendent of Neglected and Dependent Children<sup>474</sup> who would be appointed by the Governor in Council as an officer of the Attorney General. The Superintendent was to organize and advise the children's aid societies in various parts of the province; visit and inspect reformatories and foster homes as well as other institutions accepting children; visit adoptive homes of children; keep the records of the Societies; and prepare an annual report each year and submit it to the Legislature.<sup>475</sup> The Superintendent also acted as the chief probation officer for juvenile

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<sup>471</sup> The 1912 Act was enacted as *An Act to Consolidate and Amend the Law Relating to Juvenile Offenders and the Protection Of Children*, SNS 1912, c. 4, with the short title, *Children's Protection Act, 1912*.

<sup>472</sup> Section 20.

<sup>473</sup> Section 21(2). It is noteworthy, however, that by the 1917 Act, the child could not be held in a reformatory for longer than 6 months without the permission of the Superintendent: s 25(8).

<sup>474</sup> Section 9. The title of Superintendent of Neglected and Dependent Children was changed by the time of the publishing of the in the 1917 Statutes of Nova Scotia to the Superintendent of Neglected and Delinquent Children, perhaps signaling the dual nature of the role: overseeing both neglected children and juvenile delinquents.

<sup>475</sup> Section 9.

delinquents at the juvenile court. It is interesting to note that the first Superintendent was Ernest Blois, who would also become a judge of the juvenile court. Not only were the lines between juvenile delinquent and neglected child blurred in the early days of child welfare, but so were the lines between the court and the executive branch of government.<sup>476</sup>

The definition of “neglected child” contained in the 1912 Act was replete with the language of moral blameworthiness and anxiety over the activity of the poor. The 1912 Act provided that a neglected child is a child under the age of sixteen:

17(a) Who is found begging or receiving alms, or thieving in any place whatsoever, or being in any shop, saloon, tavern or other places where liquor is sold, or sleeping in open air,

(b) Who is found wandering about late hours and not having any home or settled place of abode or proper guardianship;

(c) Who is found associating or dwelling with a thief, habitual drunkard or vagrant, or who by reason of the neglect or drunkenness or other vices of its parent or guardian is suffered to be growing up without salutary parental control and education, or in circumstances exposing such child to lead an idle or dissolute life;

(d) Who is found in any house of ill fame or in the company of a reputed prostitute;

(e) Who is found destitute, being an orphan or deserted by its parents, or having a surviving parent who is undergoing imprisonment for a crime;

(f) Who patronizes or habitually visits any saloon, shop or other place where intoxicating liquors are sold, or who patronizes or habitually visits any public pool room or gambling house;

(g) Who habitually uses obscene, profane or indecent language, or is guilty of immoral conduct in any public place or in or about any school house;

(h) Who is found after the hour of eight o'clock at night in any moving picture theatre, vaudeville entertainment or theatre of any kind, not accompanied by his parent or guardian or by some person with the consent of such parent or guardian;

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<sup>476</sup> Section 29 of the 1912 Act provides, “no judge shall be disqualified from acting as such, under this act, by reason that he is a member of or hold an office in any children’s aid society.”

(i) Who is found after the hour of eight o'clock at night loitering about a place of entertainment and does not give satisfactory account of himself;

(j) Is an habitual truant and whose parent or teacher represents that he is beyond control;

(k) Who is employed in any brewery or any shop, saloon, tavern or other place where intoxicating liquors are made, bottled or sold;

(l) Who habitually uses obscene, profane or indecent language, or is guilty of immoral conduct in any place whatsoever;

(m) Who has been unlawfully assaulted or beaten by its parent, or is ill-used or treated with habitual cruelty and neglect by its parent or by the person with whom it resides;

(n) Who commits any offence punishable with fine or imprisonment or both.

What is notable, besides the overt moralizing that comprised the grounds for finding a child to be neglected, is that the provision respecting abuse and cruelty to children that had ostensibly spurred on the need for the 1882 Act, took a much less prominent position within these grounds. Furthermore, the grounds either described a child who had committed an offence such as theft or “any offence punishable with a fine or imprisonment or both”<sup>477</sup> or described circumstances which would amount to juvenile delinquency without actual proof of the child having broken the law, that is, being found with a prostitute or found in a gambling house or in a tavern, etc. The grounds were also thinly disguised synonyms for children living in poverty: children begging or receiving alms, children working and therefore truant from school, children wandering without a home, and children dwelling with vagrants or otherwise without salutary parental control. The answer for this child poverty or delinquency or neglect was the same: the child shall be committed to an industrial school, reformatory, house of industry, boys’ or girls’ home

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<sup>477</sup> Section 17(n).

or orphanage if the child is of the proper age and no foster home is found for the child.<sup>478</sup> The message of the Act was clear: when the family fails to carry out not only the economic, but also the social role expected of it, this failure provides reason enough for the state to intervene into the private sphere and ensure that the child will grow up to be a productive member of society.

The rhetoric that undergirded concern for the neglected child was also present in the rhetoric that supported the juvenile delinquency reforms of the early 20<sup>th</sup> century, evident, for example in a 1909 article on the juvenile delinquents system in the U.S.:

Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities? Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen. And it is this thought- the thought that the child who has begun to go wrong, who is incorrigible, who has broken a law or an ordinance, is to be taken in hand by the state, not as an enemy but as a protector, as the ultimate guardian, because either the unwillingness or inability of the natural parents to guide it toward good citizenship has compelled the intervention of the public authorities; it is this principle, which, to some extent theretofore applied in Australia and a few American states, was first fully and clearly declared, in the Act under which the Juvenile court of Cook County, Illinois, was opened in Chicago, on July in 1899.<sup>479</sup>

In Nova Scotia, however, there was another side to concern about the juvenile delinquent or the neglected child: prevention of future criminals. As historian Michael Boudreau has documented, the Halifax of the early-20<sup>th</sup> century was a “law and order society”.<sup>480</sup> Socio-economic changes at the time saw residents particularly anxious about

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<sup>478</sup> Section 21(1).

<sup>479</sup> Mack, *supra* note 433 at 107.

<sup>480</sup> Michael Boudreau, “Delinquents Often Become Criminals”: Juvenile Delinquency in Halifax, 1918-1935, (2010) XXXIX. 1 *Acadiensis* 108.

the “juvenile delinquent class”.<sup>481</sup> As it was thought at this time that “criminal tendencies started with the young”, an important partnership was formed between criminal justice and child protection authorities in the law and order society.<sup>482</sup> However, not all young were equally represented amongst the juvenile delinquent class.<sup>483</sup> As Rooke and Schnell have indicated in their study of child saving work in Halifax in the mid-19<sup>th</sup> century, the “street boy” problem and the concern over “street arabs” had long been a concern in Halifax, leading to the opening of the Halifax Industrial School in 1864.<sup>484</sup> While girls were no doubt a concern of child savers – especially in terms of their sexual morality<sup>485</sup> – boys of the lower classes in particular comprised the bulk of cases in the juvenile delinquent regime in Halifax.<sup>486</sup>

Around 1918, a campaign arose in Halifax to use the most modern processes to fight crime including the introduction of finger printing, and the hiring of a policewoman

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<sup>481</sup> *Ibid* at 108-109.

<sup>482</sup> *Ibid*.

<sup>483</sup> For a discussion of the construction of the “boy problem” in Toronto see Bryan Hogeveen, “‘The Evils with Which We are Called to Grapple’: Elite Reformers, Eugenicists, Environmental Psychologists and the Construction of Toronto’s Working-Class Boy Problem, 1860-1930” (Spring 2005) 55 *Labour* 37.

<sup>484</sup> Rooke and Schnell, *Discarding the Asylum*, *supra* note 143 at 96.

<sup>485</sup> In her study on the regulation of juvenile delinquency in Montreal, for example, Tamara Myers writes that girls were constructed as sex delinquents. See Tamara Myers, “Embodying Delinquency: Boys’ Bodies, Sexuality and Juvenile Justice History in Early-Twentieth Century Quebec” (2005) 14 *J of Hist of Sexuality* 383.

<sup>486</sup> As a result, the bulk of the analysis of the juvenile court reports will focus on boys as delinquents. In 1919, for example, there were 225 boys before the court that year and 13 girls. The bulk of the boys were between the ages of 11-14 (ie., 125). See Nova Scotia, House of Assembly, Office of the Superintendent of Neglected and Dependent Children, “Sixth Annual Report” in *Journals of the House of Assembly*, Appendix No 28 (1919) at 11. This gender breakdown continued into the 1930s, as Boudreau reports from 1930 to 1935, 90.6% of the total number of delinquents that appeared before the juvenile court were boys. Boudreau, “Delinquents Often Become Criminals”, *supra* note 480 at 123.

to combat the problem of this juvenile delinquent class.<sup>487</sup> Boudreau writes that the development of a juvenile justice regime and the opening of the juvenile court was also a part of this campaign to modernize the fight against crime. The philosophy behind juvenile delinquency at the time was that delinquents were wayward children who had arrived at court because of their exposure to criminal ways and unsatisfactory parenting – ironically, the very grounds that would find a child to be found a neglected child. The neglected child was merely a precursor to the juvenile delinquent and the juvenile delinquent was merely a precursor to the criminal – the specter from which society had to be protected.<sup>488</sup> The juvenile delinquent and child welfare regimes became important, mutually reinforcing systems for identifying and treating these children. The goal of the system, however, was not just to protect society from the “boy problem” on Halifax’s streets by segregating these children in institutions, or perhaps adopting them out to middle class homes, but to protect the present and future welfare of children and society by reforming them into upstanding, productive, “normal” citizens.

### **The Structure of Child Welfare in Halifax in the early Twentieth Century**

In order to understand how children in Halifax were identified as either neglected or delinquent and then placed in the appropriate institution or with the appropriate child saving society, it is important to understand the structure of the child protection regime in the Halifax in the early 20<sup>th</sup> century. The Society for the Prevention of Cruelty continued to act as a private charity concerned with the well-being of neglected children pursuant to the *Prevention and Punishment of Wrongs to Children Act* into the first decades of the

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<sup>487</sup> Boudreau, *ibid* at 110.

<sup>488</sup> *Ibid.*

20<sup>th</sup> century. The Society worked in tandem with the many child caring institutions in the city, such as the Halifax Infant's Home.

By the time the *Juvenile Delinquents Act* was passed in 1911 there were a number of child caring institutions in Halifax and between them and the Society they carried out the bulk of child protection work in the city. These institutions included the following children's homes and reformatories (including their dates of creation):<sup>489</sup>

**Children's homes:**

College Street Home for Girls (1891)  
Protestant Orphan's Home (1857)  
St. Paul's Home for Girls (1867)  
St. Joseph's Orphanage (1868)  
Halifax Infants' Home (1875)  
Home of the Guardian Angel (1888)

**Reformatories:**

Monastery of the Good Shepherd (for girls – est 1890)  
Halifax Industrial School (1864)  
St. Patrick's Home for Boys (1885)

The Halifax Infants' Home and the Home of the Guardian Angel were maternity homes; however, children under the age of 5 could also be placed in the homes without their mothers. Except for the Halifax Infants' Home, these institutions were largely denominational – either Catholic or Protestant – and for the most part only served children of their own particular denominations. The children's homes were institutions privately run by their respective religious orders and depended on the charitable giving of the citizens of the city or upon funds garnered from parents and municipalities as settlements provided for by the *Children's Protection Acts*.<sup>490</sup> On the other hand,

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<sup>489</sup> Lafferty, *The Guardianship of Best Interests*, *supra* note 436 at Appendix III.

<sup>490</sup> Lafferty notes that small amounts of funding was provided by the Province to some of these homes to assist with deferring the cost of extra care occasioned after the Halifax Explosion. As with *Poor Law* settlements parents could be made to reimburse child care institutions. Furthermore,



reformatories – as quasi penal institutions – were funded by the public purse. By the early 20<sup>th</sup> century 60% of their public funding was paid by the municipality and 40% was paid by the Province.<sup>491</sup> Furthermore, as Lafferty reports, these homes also earned funds from the labour of their inmates.<sup>492</sup> While children could be placed in the children’s home voluntarily or by the Society or eventually, by the CAS, children could only be placed in reformatories by order of the stipendiary magistrate, and after 1911, by order of the Juvenile court. However, as provided for by the *Child Protection Acts* of the time, the child need not necessarily be found to be a juvenile delinquent by the Juvenile court – ie., to have personally committed an offense – but a neglected child against whom a parent had offended, could also be ordered into a reformatory.

When one considers how private philanthropic work dominated child welfare in the city in the late 19<sup>th</sup> and early-20<sup>th</sup> century, it is easy to see how the creation of the juvenile court and the Office of the Superintendent of Neglected and Delinquent Children was an important step in greater provincial involvement in the administration of child welfare services in the Province. The Provincial Superintendent of Neglected and Delinquent Children was the first public servant responsible for child welfare in the Province. Lafferty has described the scope of this office under the charge of the first Superintendent, Ernest Blois, in the following terms:

Apart from fulfilling other duties outlined by the statute, he acted as the official CAS agent in those parts of the province that had no established CAS (including Halifax), performed the duties of probation officer for provincial juvenile delinquents, administered legislation related to children, conducted annual inspections of the province’s institutions and foster homes, and “assist[ed] and instruct[ed]” children’s aid societies across Nova Scotia. Blois’s office was essentially opened up like an umbrella over the province’s agencies and

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institutions such as the Halifax Infants’ Home that accepted unwed mothers garnered fees from these mothers for their board. *Ibid* at 93.

<sup>491</sup> *Ibid* at 92.

<sup>492</sup> *Ibid*.

institutions; whereas once they had been subject only to the rules and constitutions laid down by their boards and governors (and, of course, by the provisions of earlier provincial statutes affecting child protection efforts), they were now required to accept guidance, leadership, inspection and even rebuke from a provincial officer.<sup>493</sup>

Therefore, not only was the Office an important step in regularizing public support and oversight over the institutions and Societies, but it assisted in centralizing the work of these disparate agencies.

The need for organization and centralization became more acute by 1914. The onset of the First World War in 1914, and then the devastation wrought on the city by the Halifax Explosion, increased dramatically the number of children in orphanages and infants' homes as many parents were killed either in service, or by the Explosion itself.<sup>494</sup> The war and the Halifax Explosion also resulted in the proliferation of private charitable organizations to address the loss in the city. In 1914 the Social Services Bureau was developed in the city to help organize some of these efforts.<sup>495</sup>

Furthermore, the problem of neglected and delinquent children became such a pertinent issue for the city that the police department hired policewomen to deal especially with this pressing social issue.<sup>496</sup> In particular, one study conducted for the Bureau of Social Hygiene in the U.S. by a woman called Chloe Owings reveals that "Since April, 1917, women police have been employed by the police department of Halifax. At present there are 2 women police and 1 matron. The chief concern of the women police are neglected or

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<sup>493</sup> *Ibid* at 54.

<sup>494</sup> Suzanne Morton, "To Take an Orphan': Gender and Family Roles Following the Halifax Explosion" in Kathryn McPherson et al eds, *Gendered Pasts: Historical Essays in Femininity and Masculinity in Canada* (Don Mills: Oxford University Press, 1999).

<sup>495</sup> Miriam Jacobson, *A Better Deal for Children: A Half Century of Service (1920-1970)* (Halifax: Children's Aid Society of Halifax, 1970) at 10.

<sup>496</sup> Renee Elise de Gannes, *Better Suited to Deal with Women and Children: Pioneer Policewomen in Halifax, Nova Scotia* (Thesis, Dalhousie University, 1999).

delinquent children, wayward girls and deserted wives.”<sup>497</sup> As in the other Canadian jurisdictions covered by Owings in her study, the role of the Halifax policewomen was essentially that of early social workers. They specialized in dealing with “women’s issues” including the care of children, prostitution, single mothers, and potentially even domestic violence and abuse. While euphemistic language typical of the time is used to indicate this abuse in Owings’s study, she indicates, for example, that in Toronto, the role of policewomen was to “supervise parks and recreation grounds, public amusement places, fortune tellers, and handle matters of domestic difficulties which come to the attention of the police.”<sup>498</sup> In Winnipeg, for example, policewomen were characterized in Owings’s study as “an asset to the Department where they work in plain clothes. Their work is particularly useful in matters related to sex offenses.”<sup>499</sup> Therefore, these policewomen performed the role of ensuring a certain social and moral order as far as women and children in the city were concerned.

The Children’s Aid Society of Halifax (the “CAS”) would also come to play an important supporting role to the Superintendent of Neglected and Delinquent Children and the Juvenile court –however, not until 1920.<sup>500</sup> Even though a CAS was developed in Halifax in 1906 after a visit from John J. Kelso from Ontario, in the early years of its development the CAS was not as prominent in child welfare work in the city as the Society. The CAS was a private agency governed by a Board of Directors populated by private

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<sup>497</sup> Chloe Owings, *Women Police: A Study of the Development and Status of the Women Police Movement* (New York: Frederick H Hitchcock Publisher, 1925) at 62, retrieved from Harvard University Library Open Collections Program: <<http://ocp.hul.harvard.edu/dl/ww/001832910>>.

<sup>498</sup> *Ibid* at 60.

<sup>499</sup> *Ibid* at 61

<sup>500</sup> Jacobson, *A Better Deal for Children*, *supra* note 495 at 10.

citizens of Halifax.<sup>501</sup> It would not be until 1920 when the Provincial Superintendent, Ernest Blois, advocated on behalf of the CAS that they take on a more prominent role in child welfare work in the city. As Renée Lafferty explains:

The city's [Society for the Prevention of Cruelty], the institutions and the provincial office were overwhelmed with cases following the [Halifax Explosion], and the CAS was envisioned in part as a means of alleviating this workload. Blois himself, exercising the influence of his office, asked that a separate agency be established, and for at least the first year of its operation, the mandate of the Halifax CAS was only to assist the work of the provincial superintendent and the Juvenile court. It was not until 1925 that a permanent social worker, Gwendolen Lantz, was hired to run the society [ie., the CAS]'s operations.<sup>502</sup> [citations omitted]

In the first years of its revival after 1920, the Halifax CAS was a small organization, relying on the two policewomen in Halifax as well as the truant officer in the city to carry out its work.<sup>503</sup> It would not be until 1922 that it would hire its first social worker.<sup>504</sup> During the 1920s the CAS continued to rely upon the institutions to take its wards.<sup>505</sup> As Lafferty has pointed out in her book, unlike other jurisdictions in Canada, Nova Scotia's institutions continued to comprise a significant part of the child welfare system of the province, even into the middle of the century.<sup>506</sup> In particular, these institutions, backed by the support of the Office of the Superintendent and the work of the juvenile court, undertook the important work of reforming not just delinquent children, but neglected children as well. The following section will look closely at the work of reforming children and how the institutions and social service agencies in the city increasingly came to rely upon the

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<sup>501</sup> *Ibid.*

<sup>502</sup> Lafferty, *supra* note 436 at 61-62.

<sup>503</sup> Jacobson, *supra* note 495 at 10.

<sup>504</sup> *Ibid* at 12.

<sup>505</sup> *Ibid.*

<sup>506</sup> Lafferty, *supra* note 436 at 15-16.

sciences to shape their work with children. I will argue that even though scientific explanations were being brought to bear on neglect, delinquency and its treatment, the historical record reveals that medicalization did not serve to displace moralized decision-making about the best interests of children, but rather gendered, raced and ableist assumptions were reproduced in medical terms.

### **The Socializing Work of the Institutions**

While the child caring field was dominated in the first decades of the 20<sup>th</sup> century by the denominational institutions – and indeed, they continued to perform a significant part of child welfare work into the middle of the century – child caring work was not wholly dominated by a religious discourse. Increasingly, alongside this religious discourse, members of the child protection system in the city came to accept more scientific causes and treatments for delinquency and neglect. Furthermore, child protection work in the first decades of the 20<sup>th</sup> century in Halifax was beginning its evolution from a field dominated by philanthropists to a more organized and professionalized corps of social workers. The central ideology of the private philanthropy movement was that a morally upright citizen volunteer was needed in order to serve as a “friend” to guide a dependent family of paupers out of poverty.<sup>507</sup> The growing economic turmoil of the early 20<sup>th</sup> century threw these ideas into sharp relief.<sup>508</sup> Entreating the dependent to work no longer offered them such an obvious way out of pauperism and dependency when work was becoming increasingly hard to find and work that could be found was ill-paying. Increasingly,

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<sup>507</sup> Roy Lubove, *The Professional Altruist: The Emergence of Social Work as a Career 1880-1930* (Cambridge, MA: Harvard University Press, 1965) at 13.

<sup>508</sup> *Ibid* at 16.

scientific explanations were coming to bear upon the field of social work and the work of child caring institutions.<sup>509</sup>

While the CAS would not hire its first professional social worker until 1925, the institutions in Halifax themselves did employ professional social workers to assist in placing children in foster and adoptive homes. In the first decades of the 1900s, the Halifax Infants' Home hired its first professional social service worker to carry out placement work.<sup>510</sup> However, it was not just the work of placing children which became professionalized and more "scientific" in its method; the actual work of reforming children in the institutions became more reliant on science in its methods. One example was the growing concern with the problem of "feeble-minded" or "backward" children in the early 20<sup>th</sup> century in the province. The fields of criminology, psychiatry and social work converged on the problem of the feeble-minded at this time and alerted human service professionals to the need for "scientific casework".<sup>511</sup> As one historian writes:

Widespread public interest in the control of the feeble-minded had important consequences for social work. The alarm over the menace of the mental defective alerted social workers to the possibility that a client's behavior might reflect not an obstinate reluctance to accept good advice or innate moral perversity, but a subnormal mentality. The mental test became a significant weapon in the caseworker's scientific arsenal.<sup>512</sup>

While in Britain a Royal Commission on the Care and Control of the Feeble-minded had been conducted in 1909,<sup>513</sup> it was not until 1916 that a similar study would be

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<sup>509</sup> *Ibid.*

<sup>510</sup> Lafferty, *supra* note 436 at 113-114.

<sup>511</sup> Lubove, *The Professional Altruist*, *supra* note 507 at 66.

<sup>512</sup> *Ibid* at 67.

<sup>513</sup> Great Britain Commissions for the Care and Control of the Feeble-Minded, *Report of the Royal Commission on the Care and Control of the Feeble-minded* (London, 1908).

conducted in Nova Scotia with the establishment of a Commission respecting Feeble Minded Persons in Nova Scotia, and the presentation of the report of the Commission to the Legislature the following year. The Commission was comprised of the Superintendent of Education, the Superintendent of Neglected and Dependent Children, and the Provincial Health Officer. The *Report Respecting Feeble Minded in Nova Scotia*<sup>514</sup> set out to systematize the understanding and treatment of the problem of the feeble-minded. The report began by drawing upon the definition of feeble-minded from the *Mental Deficiency Act*, England, 1915 as:

Persons in whose case there exists from birth or from an early age mental defectiveness not amounting to imbecility, yet so pronounced that they require care, supervision, and control for their own protection or for the protection of others, or, in the case of children, that they, by reason of such defectiveness, appear to be permanently incapable of receiving proper benefit from the instruction in ordinary schools.<sup>515</sup>

The Report went on to distinguish the feeble-minded from imbeciles,<sup>516</sup> idiots<sup>517</sup> and moral imbeciles.<sup>518</sup> There were some numbers for the prevalence of idiots from the 1911 census, but the writers suspected that the less readily identifiable and less understood category of feeble-minded had “escaped the consideration of the census enumerators”.<sup>519</sup>

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<sup>514</sup> Nova Scotia, House of Assembly, Commission Respecting Feeble Minded Persons in Nova Scotia, “Report Respecting Feeble Minded in Nova Scotia” in in *Journals of the House of Assembly*, Appendix No 33 (1917).

<sup>515</sup> *Ibid* at 1.

<sup>516</sup> Imbeciles are defined in the report as: “Persons in whose case there exists from birth or from an early age mental defectiveness not amounting to idiocy, yet so pronounced that they are incapable of managing themselves or their affairs, or, in the case of children, of being taught to do so.” *Ibid*.

<sup>517</sup> Idiots are defined as: “Persons so deeply defective in mind from birth, or from an early age, as to be unable to guard themselves against common physical dangers.” *Ibid*.

<sup>518</sup> Moral imbeciles are defined as: “Persons who from an early age display some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has had little or no deterrent effect.” *Ibid*.

<sup>519</sup> *Ibid* at 2.

Despite the absence of numbers, the Report confirmed that the significance of the problem of the feeble-minded was far reaching and concerned not just “the unfortunate individual but every member of his household, and, to a greater or less extent, every member of the community.”<sup>520</sup> Apart from their economic impact – these persons were seen to be unproductive citizens<sup>521</sup> – they created domestic, moral, and social problems. The feeble-minded in the classroom “influence through suggestion or imitation the more unstable of the normal minded pupils to their degradation”<sup>522</sup> and feeble-minded women were more likely to give birth to illegitimate and neglected children, creating for their children a “most degrading” moral and physical environment.<sup>523</sup>

The writers of the Report gave a number of indications how to find this elusive category of feeble-minded persons. Feeble-mindedness as an inherited condition would be found in families – 80% of mental deficiency, the Report noted, is inherited.<sup>524</sup> Further, the report indicated that “Statistics show that the families of the higher grades of the feeble-minded are larger than the families of normal parents...This of course, has a special bearing upon the production not only of the feeble minded, but of the closely related classes – the unfit, the dependent and the potentially criminal.”<sup>525</sup> Psychologists and psychiatrists could expect that feeblemindedness would be found in large families (no doubt Catholics in Nova Scotia at the time had larger, in the main, poorer families than their Protestant counterparts) and where they had found one feeble minded, unfit,

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<sup>520</sup> *Ibid* at 3.

<sup>521</sup> *Ibid*.

<sup>522</sup> *Ibid* at 7.

<sup>523</sup> *Ibid* at 4.

<sup>524</sup> *Ibid* at 3.

<sup>525</sup> *Ibid*.



dependent or potentially criminal figure, they could search the family and be sure to find that it was composed of 80% more of the same.<sup>526</sup>

The writers of the Report indicated that larger classes of feeble-minded could be found amongst the poor in almshouses,<sup>527</sup> among illegitimate mothers in the Halifax Infants' Home,<sup>528</sup> in industrial schools and reformatories,<sup>529</sup> in prisons,<sup>530</sup> and in asylums amongst the insane and epileptic.<sup>531</sup> The feeble-minded student had to be sought out in public schools as they had a devastating effect on the education of those around them.<sup>532</sup> The compiling of statistics in these institutions was very important to the task of seeking out the feeble-minded. Once their prevalence was established, these departments were no longer just dealing with individuals but with the populations of these institutions as a knowable, calculable entity. They could therefore look at the population of the prison or the maternity home, for example, and predict how many feeble-minded they would find. This prediction then determined the likelihood of each individual being a member of the feeble-minded. The capacity for scientific prediction became an important part of both modern policing and modern social work.

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<sup>526</sup> *Ibid.*

<sup>527</sup> *Ibid.*

<sup>528</sup> At a prevalence rate of 12.5%. *Ibid* at 4.

<sup>529</sup> At a prevalence rate of approximately 25%-60%. *Ibid* at 5.

<sup>530</sup> While no exact number was provided for the percentage of feeble minded in jails, it was agreed amongst the experts that there was a great prevalence, especially since "Every imbecile is an incipient criminal." *Ibid* at 6-7.

<sup>531</sup> The prevalence rate of the feeble minded amongst the insane and epileptics are reported to be 7 times more than in the normal population. *Ibid* at 7-8.

<sup>532</sup> *Ibid* at 7.

The poor, and particularly poor women, formed a special focus as the feeble-minded were depicted as more often having illegitimate children or conversely, of being an illegitimate child. The Report indicated that “the feeble-minded woman is three times more liable to create children than the feeble minded man”<sup>533</sup> – the implication being that feeble-minded women (or really all women until one finds out they are not feeble-minded) should be of especial consideration. Prostitutes and “sexually immoral” women were more likely to be feeble-minded with proportions ranging from anywhere to 62% to 85.8% of prostitutes studied being feeble-minded.<sup>534</sup> Although racial characteristics are notably absent from this Report, it is reasonable to assume that given the visibility of African Nova Scotian women among the prostitutes in Halifax at this time<sup>535</sup> or otherwise living in poverty in Nova Scotia, the fact of being African Nova Scotian would provide a greater likelihood of scrutiny in the search for and control of the feeble-minded.

The discourse that surrounded feeble-mindedness was very much a part of a larger, Social Darwinist discourse which applied ostensibly scientific and biological explanations to social problems, resulting in the belief that these social problems were caused not by overarching social and economic inequality, but by the natural selection and the biological states of certain types of persons. In order to ensure a strong social and political culture, weaker types of persons such as the feeble-minded had to be controlled, for fear that they would reproduce and weaken the society as a whole. While feeble-mindedness as a social construct, then, served to perpetuate a moral regulation of persons in poverty, it was

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<sup>533</sup> *Ibid* at 4.

<sup>534</sup> *Ibid* at 4.

<sup>535</sup> Suzanne Morton, “Separate Spheres in a Separate World: African-Nova Scotian Women in late-19<sup>th</sup>-Century Halifax County (1993) XXII.2 *Acadiensis* 61 at 75.

couched in more modern, medicalized terms – shedding the more overtly religious language of philanthropic social reform.

The construct of the feeble-minded individual as the source of a myriad of social problems gave the fields of law, psychology and importantly, child protection, authority to find the feeble-minded among the general population and to solve the problems they posed to society.<sup>536</sup> The concept was very effective for extending the potential reach and power of the juvenile delinquent regime, the child protection workers, their psychiatrist and the juvenile court. The final recommendation of the *Report on Feeble Mindedness* is quite telling in the role it saw for the juvenile delinquent regime, the schools and hospitals as places of segregation:<sup>537</sup>

There is much variety of opinion as to the method by which the prevalence of feeble-mindedness may be most effectively reduced. Amongst measures suggested we may include state regulation of marriage, asexualization of those who are committed to asylums as insane or feeble minded, or who are convicted of crime, and the segregation of the feeble minded. In some communities all of these measures are being given a trial. It appears to be generally conceded that the method which is not only most effective but which gives the least offence to popular sentiment is the system of segregation. In connection with many institutions the effort is made to train children in some line of usefulness, but it is not now regarded as possible to prepare any considerable proportion of such children for successful careers outside the institution. As far as the females, at any rate are concerned, it is now regarded as essential that these should be kept under care at least until the child-bearing period has passed.<sup>538</sup>

Feeble-mindedness was associated with pauperism, prostitution, juvenile delinquency, intemperance, insanity and epilepsy. But as opposed to the vagrancy laws, the search for the feeble-minded and the accepted social practice of segregation and

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<sup>536</sup> Lubove, *The Professional Altruist*, *supra* note 507 at 67; McLaren, *Our Own Master Race*, *supra* note 439 at 37.

<sup>537</sup> The report was compiled by the Superintendent of Education, the Superintendent of Neglected and Dependent Children, and the Provincial Health Officer.

<sup>538</sup> *Respecting Feeble Minded Persons in Nova Scotia*, *supra* note 514 at 8.

institutionalization allowed state institutions to address these social problems as medical problems as opposed to economic problems.<sup>539</sup> While sterilization was not openly undertaken in the institutions in Nova Scotia, eugenicist explanations undergirded much of the discourse around the feeble-minded.<sup>540</sup> Indeed, segregation and institutionalization was a socially acceptable means of keeping the feeble-minded from reproducing as there was little public support for sterilization at the time.<sup>541</sup> In any event, the medicalization of problems that were once the field of a religious and philanthropic discourse helped to modernize and professionalize work with children.

This increasing reliance on the predictive and diagnostic expertise of psychiatry and medicine in the children's institutions in Halifax resulted in the Office of the Superintendent hiring a psychiatrist in 1919, Dr. Eliza Brison, to assist the Juvenile court in testing the intelligence of children in care and to categorizing them accordingly. Dr. Eliza Brison's reports reveal that she was implementing a classification system based upon the test for the feeble-minded developed by Dr. Goddard, a renowned expert in the field.<sup>542</sup>

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<sup>539</sup> See, for example, McLaren, *Our Own Master Race*, *supra* note 439 at 37.

<sup>540</sup> *Ibid* at 40.

<sup>541</sup> *Ibid* at 43.

<sup>542</sup> Dr. Henry H. Goddard, was a psychologist from Vineland, N.J. who was one of the first to use the psychological test as measure of mental deficiency, as early as 1905 to 1908. He devised his own classification scheme – ranging from “the idiot” to “the moron” in 1910. He encouraged that the use of the tests and his classification scheme was to be used by the school inspector to root out backwardness in institutions such as schools and reformatories. Goddard warned that statistically, the medical inspector should find “on average one child in every room he visits who is so far behind in mental development that he needs special recognition, special care and treatment.” However, he also cautioned that often the medical inspector will not have the time to diagnose deficiency and to this end “it would be well if the school system itself employed special persons to make these examinations of mentality, so that the medical inspector could concentrate his time upon those cases that were reported to him as not being able to do their work in a normal manner.” He recommended categorizing the children into groups: average, one year below average, two years below, three years below, etc. thereby allowing the inspector to more efficiently examine the children and allow for the removal of the most deficient. Goddard warned that while not much can be done for the feebleminded child – a recognition that the mental defect of “backwardness” is distinct from feeblemindedness – the school must endeavour to root out and treat the disease of backwardness. “The Hygiene of the Backward Child” by Henry H. Goddard, Psychological Research,

By 1923, Dr. Brison reported that she had examined 306 children: 162 classified as delinquents; 39 as truants; and 105 as neglected.<sup>543</sup> She employed the following categories to diagnose the children she saw:

Normal: applies to a person of average intelligence;

Borderline: to a condition bordering on feeble-mindedness;

Moron: to a high-grade feeble-minded person;

Imbecile: to a medium grade feeble-minded person;

Idiot: to a low grade feeble-minded person.

In Dr. Brison's actual diagnosis of children, however, she also diagnosed "superior intelligence", "dull normal" (ie., backward), "high grade moron" and "low grade moron". While she indicated that the scale of diagnosis could range from superior intelligence down to idiot and then to "10. Constitutional Inferiors; 11. Psychopath; 12. Slight Unbalance, but not Insane; 13. Insane (Dementia precox.); and 14. Insane" she did not diagnose any of the children with these categories. In her summary of findings, Dr. Brison reported that "out of the total number examined for your office there are 38 boys and 41 girls who should be

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Training School, Vineland, N.J., as attachment to Nova Scotia, House of Assembly, Office of the Superintendent of Neglected and Dependent Children, "Third Annual Report" in *Journals of the House of Assembly*, Appendix No 28 (1916) at 40.

The attention to the problem of the feeble-minded led to an interest in sterilization and eugenics that would grow into middle part of the 20<sup>th</sup> century and was informed by Social Darwinist thinking of the time. Dr. Goddard's seminal work, the *Kallikak Family*, for example, was a study of a family which produced a considerable number of feeble-minded members. Goddard's study of the family proved that family "stock" was productive of the problem of the feeble-minded. Controlling the stock – or the reproductive ability of the family – was a preventive means of socially controlling for the feeble-minded. Sterilization and eugenics became the focus of serious scientific study for those interested in the problem of the feeble-minded. See also Angus McLaren, *Our Own Master Race: Eugenics in Canada, 1885-1945* (Toronto: McLelland and Stewart, 1990).

<sup>543</sup> Nova Scotia, House of Assembly, Office of the Superintendent of Neglected and Dependent Children, "Eleventh Annual Report" in *Journals of the House of Assembly*, Appendix No 28 (1924) at 43.

in a special institution for the care of the mentally deficient. Because of their low grade mentality and social unfitness, the girls more especially require institutional care.”<sup>544</sup>

In the 1923 Annual Report the Superintendent of Neglected and Delinquent Children reported that “there is a considerable number of children committed to our care, who cannot be placed in foster homes because of their low mentality or diseased physical condition or both”<sup>545</sup> and that the care of the feeble-minded was a serious problem for the CAS. The report of the juvenile court judge for 1923 indicated that:

One of the causes of truancy is undoubtedly feeble-mindedness on the part of the boy. Dr. Brison’s report herein published confirms this view. There are undoubtedly other causes, and we sometimes question whether the school’s system meets the needs of the various types of boys. Parents too are much to blame. Some of them take little or no interest in their children and apparently do not value an education.<sup>546</sup>

Noteworthy is the particular concern to the Superintendent in this 1923 Report for feeble-mindedness in girls and the need for a home for girls who were found to be feeble-minded. Because the 1917 Act provided that a child had to be released from the care of the CAS by the age of 20, feeble-minded girls were being released back to feeble-minded parents. In particular, the Superintendent recounted three such stories where feeble-minded girls were released and “had improper sexual relations”, were found to “be unclean in her habits, indolent and immoral”, or “gave birth to an illegitimate child and lead a very wild life.”<sup>547</sup> While the problem of feeble-mindedness was increasingly becoming medicalized, it served to reinforce a sexual regulation of girls and women and reinforced raced and classed notions of normalcy. While feeble-mindedness meant low intellectual

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<sup>544</sup> *Ibid* at 45.

<sup>545</sup> *Ibid* at 33.

<sup>546</sup> *Ibid* at 48.

<sup>547</sup> *Ibid* at 34.

function and, as we will see, truancy in boys, in girls it meant a certain sexual lasciviousness.<sup>548</sup>

By 1928, Dr. Clyde Marshall was appointed as Provincial Psychiatrist to assist the societies in child welfare work and direct the reformatories on appropriate vocational training for children. Key to protecting society from impoverished, delinquent children, was to make them productive citizens who would not become a charge on the public purse.<sup>549</sup> Vocational training was central to the child protection project. In 1928 alone the psychiatrist examined 533 children, only 35 of whom were examined in connection with the juvenile court.<sup>550</sup> Dr. Marshall explained in the report that his examinations were for the purposes of assisting the societies and the courts in determining which children had “sufficient intelligence and whose personalities were well enough adjusted to get along in the community. Many normal children were found mingling with the Feebleminded and Insane and recommendations were made that they be placed in homes.”<sup>551</sup>

Dr. Marshall's report reveals that psychiatric knowledge was being utilized to assist the reformatories in setting their vocational training for delinquent youth to appropriate levels and according to gendered divisions of labour. Reformatories were provided with a guide for the vocations of crop raising, woodwork and plain sewing that they could follow in order to adjust vocational training to the particular intellectual functioning of each child,

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<sup>548</sup> For a discussion of the “girl problem” in late 19<sup>th</sup> and early-20<sup>th</sup> century Canada, see Sangster, *Girl Trouble*, *supra* note 104; Tamara Myers, *Caught: Montreal's Modern Girls and the Law, 1869-1945* (Toronto: University of Toronto Press, 2006).

<sup>549</sup> See Boudreau, “Delinquents Often Become Criminals”, *supra* note 480 at 108.

<sup>550</sup> Nova Scotia, House of Assembly, Office of the Superintendent of Neglected and Dependent Children, “Sixteenth Annual Report” in *Journals of the House of Assembly*, Appendix No 28 (1929) at 66.

<sup>551</sup> *Ibid.*

as assessed by the psychiatrist. As an illustration, the following is a scale provided for “Plain Sewing” for girls:

### **Plain Sewing**

Mental age of 4. Elementary sewing and various stitches

Mental age of 5. Sewing outline stitch following pattern.

Mental age of 7. Plain and Italian hemstitching. Operating the household sewing machine.

Mental age of 8. Making dresses cut out by others.

Mental age of 9. Cutting out and making not too complicated dresses. Operating a foot power machine.<sup>552</sup>

In the 1928 Annual Report, Dr. Marshall reported on the work he had undertaken for the juvenile court during that year. Delinquents were examined for “abnormalities such as over development, excessive sexual characteristics, foci of irritation, etc.” through physical examination, after which intelligence testing would be undertaken.<sup>553</sup> Finally, Dr. Marshall reported that after physical and intelligence testing, he would administer a personality test on the child and analyze the child’s social history including home influences, other environmental factors, “his habits, previous experiences, mental attitudes and conflicts.”<sup>554</sup> He reported that one of the most frequent problems confronted by the juvenile courts was that of the truant child. He gave an illustration of one case of a truant child where intelligence testing had determined that the child was functioning intellectually below his age and below the grade he was placed in. After being placed in the appropriate grade he flourished and was no longer truant. The case exemplified that, through proper scientific assessment and analysis, the causes of delinquency could be

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<sup>552</sup> *Ibid* at 69.

<sup>553</sup> *Ibid* at 70.

<sup>554</sup> *Ibid*.



addressed and remedied. Once the child attended school on a regular basis he would no longer be found truant and therefore no longer be labeled a delinquent. In his annual report for 1928, Dr. Marshall advocated the development of a behaviour clinic to give these cases of delinquency the attention they truly needed.<sup>555</sup>

Psychiatric knowledge not only integrated assumptions about class, gender, sexuality and ability into its systems of categorization and treatment of children, but most disturbingly, child development theory at the time was informed by racist and colonial systems of thought imported into its ostensibly objective and scientific work. As Renée Lafferty has detailed in her book on institutional care of children in Nova Scotia in the early part of the century, “recapitulation theory” undergirded the child development work of the institutions in this era. Lafferty describes recapitulation theory:

This theory was most articulately expounded by influential American psychologist and pedagogical theorist G. Stanley Hall, and through his work and that of his supporters, it became axiomatic in child study circles in the late nineteenth and early twentieth century. To a certain extent, recapitulation identified all children with savagery. Importantly, however, it was believed that when a child/savage was consciously aided and trained, he or she could develop into the highest expression of human evolutionary progress. It was equally understood that only those races whose members were already evolved could claim the full benefits of recapitulation for their children. As nonwhites were considered less evolutionarily advanced, their children could be expected to develop only as far as their race itself developed. Therefore, although the intelligence of black children was often considered equal to that of white children, they advanced no further. Their parents were generally believed to be “roughly as intelligent as Anglo-Saxon children, precisely because their intellectual development stopped in the evolutionary state corresponding to white childhood.”<sup>556</sup>

This social Darwinist interpretation of child development theory would prove to have devastating effects on the lives of children in Nova Scotia’s two racialized child caring institutions: the Nova Scotia Home for Colored Children and the Indian Residential School at Shubenacadie. It is worth noting that the Home for Colored Children, for example, was

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<sup>555</sup> *Ibid.*

<sup>556</sup> Lafferty, *supra* note 436 at 71.

initially erected at the behest of the African Nova Scotian community. The creation of the Home at the outset, was not, as some may assume, solely a deliberate plan of social control by a white state to isolate and control African Nova Scotian children. Lafferty has written most recently about the political and social ideals that lead to the opening of the institution in 1921:

[T]he opening of this institution represents a significant elaboration of the tendency to segregate children according to religious affiliation, which was so fundamental to the province's early welfare services. However, the home was not simply foisted upon the province's black population by white caregivers interested in maintaining whites-only orphanages (although this motive certainly existed). It also emerged from within the black community itself as an expression of ethnic pride. The realities of racial tensions in the city and province and the visible preference for institutional modes of child rescue made the home a necessary addition to the province, but so did the social, spiritual, and political aspirations of the black community's leaders. The local circumstances and decisions that led to the founding of the home reveal both this racial tension and the deeply racial understanding of civilization and childhood that was so ubiquitous at the turn of the century in Halifax and elsewhere.<sup>557</sup>

Besides notions of pride and "racial uplift", Lafferty has written that the reasons behind the black community's insistence on the development of a home for colored children was the fact that many white homes would not take non-white children and they were often found in county poor farms and asylums.<sup>558</sup> The African Nova Scotian community desired the same modern method of child protection as was available for white communities at the time.

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<sup>557</sup> *Ibid* at 64.

<sup>558</sup> *Ibid* at 66. Lafferty also points to Halifax CAS concerns from 1928 that it characterized in these terms: a "serious community problem" [that] was created by the 'negro child and the negro unmarried mother' due to a lack of support for unmarried mothers in institutions such as the Halifax Infants' Home. Lafferty explains, *ibid* at 126-127:

Despite earlier claims by the Halifax Infants' Home that black mothers and children were welcome, the CAS declared that "no institution would admit a negro baby who is under two years of age." In these cases (the CAS report noted twenty-two children and fifteen mothers), the women "returned usually to their own homes which, in the opinion of the CAS director, provided little in moral or physical care." [citations omitted]

The creation of the home, however, also corresponded to wider society's wish to keep black children segregated from white children – African Nova Scotians had for some time been ghettoized in Nova Scotia.<sup>559</sup> The Home for Colored Children was set back from the residential areas of Preston, Nova Scotia. While initially the idea was that a home set in the country would provide a more “natural” and “wholesome” country setting for the children, its location resulted in the children being segregated from their wider community. This segregation would eventually prove to result in a lack of transparency over life in the Home – allowing abuse and poor living conditions to proliferate unchecked.<sup>560</sup> Furthermore, segregation of black children from white homes assisted in the perpetuation of the ideas of the time that a proper and moral childhood was a white childhood. The practice of diagnosing, categorizing and segregating children into specific institutions based upon their particular needs in child welfare practice in Nova Scotia at the time gave the illusion that the segregation of black children was a response to their own particular needs – and not a desire for their segregation in society as a whole. Just as feeble-minded children were diagnosed, classified as feeble-minded and segregated “for their own good,” so the segregation of African Nova Scotian children fed into similar ideas of specialized reform.

The same social Darwinist thinking similarly informed the work of federal and religious institutions in the development and maintenance of the Indian Residential School system in Canada. The residential school system had begun in Canada in the late 19<sup>th</sup> century and in this sense the opening of the Indian Residential School at

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<sup>559</sup> *Ibid.*

<sup>560</sup> Jane Armstrong, “Breaking the Silence: Stories of Violence and Abuse at a Halifax Home for Black Children Spur Calls for an Inquiry”, *Macleans*'s (5 November 2012) 19.

Shubenacadie, Nova Scotia in 1930 was a late addition to the system.<sup>561</sup> By the time the school was built, the Indian residential school system was firmly established with fully developed procedures, rationales and curricula. The rationale for the development of the residential school system was to civilize and socialize the “savage” Indian by removing children from their home into schools, where, by 1922, they would stay for 10 months of the year.<sup>562</sup> As the creation and regulation of the legal category of “Status Indian” was federal jurisdiction, children were removed to residential schools by Indian Agents established under the *Indian Act*.

As in other residential schools, children at Shubenacadie were not allowed to speak the Mi’kmaq language nor were they allowed to practice or display their culture. Accounts of life in the school by Isabelle Knockwood, for example, indicate that the children were given numbers and clothes with black and white vertical stripes (which she likens to prison garb) and their hair was cut. Praying and attending mass were mandatory as were daily exercises.<sup>563</sup> Children were taught strict discipline and were made to learn not only academics which would be useful to the larger white society, but similar to the children in the provincial system of reformatories, child caring institutions and industrial schools, they were made to learn a trade conducive to their gender, class and level of “civilization”. As with African Nova Scotian children, it was expected that they would only progress so far given the circumstances of their race.<sup>564</sup>

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<sup>561</sup> Chris Benjamin, *Indian School Road: Legacies of the Shubenacadie Residential School* (Halifax: Nimbus Publishing, 2014) at 43.

<sup>562</sup> John Sheridan Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: University of Manitoba Press, 1999) at 26.

<sup>563</sup> Isabelle Knockwood, *Out of the Depths: The Experiences of Mi’kmaq Children at the Indian Residential School in Shubenacadie, Nova Scotia* (Lockeport, NS: Roseway, 2001).

<sup>564</sup> Milloy, *A National Crime*, *supra* note 562 at 26.

In his book on the residential school system, John Sheridan Milloy quotes J.A. Macrae, the Department of Indian Affairs Inspector of Schools for the Northwest, in language predicated upon a social Darwinist logic:

The circumstances of Indian existence prevents him from following that course of evolution which has produced from the barbarian of the past the civilized man of today. It is not possible for him to be allowed to slowly pass through successive stages, from pastoral to agricultural life and from an agricultural one, to one of manufacturing, commerce or trade as we have done. He has been called upon suddenly and without warning to enter upon a new existence. Without the assistance of Government, he must have failed and perished miserably and he would have died hard entailing expense and disgrace upon the Country.<sup>565</sup>

In order to ensure that Indian children were sufficiently socialized and civilized, they had to be removed from the uncivilizing influences of their parents and communities and taught the ways to be productive in the modern world of “manufacturing, commerce or trade.” While both the Nova Scotia Home for Colored Children and the Indian Residential School were two instances of the literal institutionalization of racist and colonial policies to socialize children to become more civilized, these institutions can still be seen to be a part of the system of child caring institutions that emerged in Nova Scotia in the late 19<sup>th</sup> century. As Milloy has commented, the residential schools “were part of a network of institutions meant to be servants ministering to industrial society’s need for lawfulness, labour and security of property”,<sup>566</sup> of which Nova Scotia’s child caring institutions were also a part. However, correction, discipline and finally, coercion, became an integral part in dealing with children who it was believed represented man in his more primitive state of wildness and savagery.<sup>567</sup> The isolation of both the Nova Scotia Home for Colored Children and the Shubenacadie School, both physically, and in the hearts and

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<sup>565</sup> *Ibid* at 27.

<sup>566</sup> *Ibid* at 33.

<sup>567</sup> Benjamin, *Indian School Road*, *supra* note 561 at 99.

minds of mainstream Nova Scotians, meant the abuses committed against those children went unseen and unaddressed.

Therefore, while child development was becoming increasingly medicalized in Nova Scotia's child caring institutions in the early 20<sup>th</sup> century, this medical knowledge of child development was also dependent upon, and served to further raced, colonial, gendered, sexualized, ableist and classed power. These overarching power relations in society were not challenged in the reform of children, but rather they were drawn upon and reinforced. The ideal citizen in whose image they were reformed, was a white, middle-class, able-bodied citizen. The child exposed to an environment which was not conducive to this ideal was neglected and potentially delinquent. Children from poor and racialized families were from the outset targeted with suspicions of neglect and delinquency.<sup>568</sup> These families would accordingly receive special attention from both state and non-state actors concerned with child protection: teachers, truancy officers, police, philanthropic volunteers, and denominational personnel. It is important to note, however, that the system of institutions was seen at the time as a great improvement upon the Poor House method of providing relief to children in poverty. Low-income families would draw upon the services of the institutions in order to improve their quality of life and the quality of life of their children.<sup>569</sup> Unwed and other poor mothers would voluntarily use the services of denominational child caring institutions like the Jost Mission,<sup>570</sup> the Halifax Infants

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<sup>568</sup> Milloy, *supra* note 562.

<sup>569</sup> See, for example, Sara Posen, "Examining Policy from the 'Bottom up': The Relationship between Parents, Children and Managers at the Toronto Boys' Home, 1859-1920" in Lori Chambers and Edgar-Andre Montigny eds, *Family Matters: Papers in Post-Confederation Canadian Family History* (Toronto: Canadian Scholar's Press Inc, 1998).

<sup>570</sup> See Simmons, "Helping the Poorer Sisters", *supra* note 420.

Home and the Home of the Guardian Angel.<sup>571</sup> It was similarly not always the case that the child protection regime would have to forcibly remove the children from the home.

However, placement with a child caring institution, as discussed in the previous chapter, brought with it a dangerous proposition for the integrity of the family: permanent removal of the child. Most disturbingly, institutionalization proved to be a dangerous strategy for children. We are only now coming to grasp the extent of the pain and abuse suffered by the children that were placed in the care of these institutions.<sup>572</sup> We may never fully grasp the cultural, political and social effects of the ideas developed and disseminated by the system. However, rather than providing a check on state action and protecting the fundamental human rights of the children in the institutions, the juvenile courts encouraged the scientific classification of these children and the medicalization of their reform. In the texts of the juvenile courts we can begin to see how legal knowledge of harm to children – and consequently, the best interests of children – became tightly bound with medical knowledge of child development.

### **Socializing Justice: The Role of the Juvenile Court**

In Chapter 2 we saw how the Acts passed in the late 19<sup>th</sup> century began to legislate a sphere of childhood and to regulate this sphere both within the family and in society as

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<sup>571</sup> Suzanne Morton, “Nova Scotia and Its Unmarried Mothers, 1945-1975” in Nancy Christie and Michael Gauvreau, eds, *Mapping the Margins: The Family and Social Discipline in Canada, 1700 to 1975* (Montreal: McGill University Press, 2004) at 335. It is important to note, however, that even though the Halifax Infants’ home indicated that it did take African Nova Scotian children, by 1928 the Halifax CAS was pointing to the absence of support by the homes for these children and African Nova Scotian unwed mothers. See Lafferty, *supra* note 436 at 127.

<sup>572</sup> Truth and Reconciliation Commission of Canada, *The Survivors Speak: A Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015), online: TRC Canada <[http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Survivors\\_Speak\\_2015\\_05\\_30\\_web\\_o.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Survivors_Speak_2015_05_30_web_o.pdf)>; in June 2015 the Government of Nova Scotia announced a Restorative Inquiry into the Nova Scotia Home for Colored Children, online: Restorative Inquiry <<http://restorativeinquiry.ca/restorative-inquiry>>.

a whole. The introduction of juvenile delinquent legislation was a further development of this regulation of childhood and it marks a move from the use of criminal to probationary sanctions. These reforms were introduced at the beginning of the 20<sup>th</sup> century in the name of child protection and prevention of cruelty against children. Subjecting children to the same conditions as adults in penitentiaries was just as cruel as subjecting children to the same conditions in the Poor House. The new juvenile delinquent legislation also introduced Juvenile courts which marked a change in the judicial enforcement of child protection legislation.

The *Prevention and Punishment of Wrongs to Children Act* of 1882, was a product of criminal and philanthropic interventions and was enforced by the criminal apparatus of the stipendiary magistrate. The job of the stipendiary magistrate was to adjudicate upon whether or not the parent had committed the quasi criminal act of neglecting their child. In *re Mahoney*,<sup>573</sup> once the stipendiary magistrate had proclaimed the guilt of the parent, the magistrate would sentence to possible incarceration, not the parent, but the child, based upon the principle of the welfare of the child. The parents' sentence was the loss of custody of their child, or having to pay a fine. Once the magistrate established that a wrong against the child had been committed, his role with regard to the welfare of the child was a limited one in that would merely see him sentence the child to a particular home for a particular amount of time or place the child in the care of the Society for the Prevention of Cruelty. It would be the home or Society that would decide what to do with the child.

With the introduction of the juvenile courts, however, and in particular, ideas about probationary and "socializing justice" a more concerted intervention with the child was undertaken on behalf of the courts and the experts associated with the court. The juvenile courts as specialist courts were meant to develop specialist knowledge about children,

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<sup>573</sup> (1892) 24 NSR 86.



about child delinquency and neglect, and about working with children to reform them and create productive citizens who would not become a charge on the public purse. The early years of the juvenile court saw the use of the older Victorian discourse of cruelty to children to create, understand and solve the problem of neglected and delinquent children. The Kelso-esque discourse of maternalism and conservative Christian moralizing are present in the juvenile court reports of Judge Wallace, for example, the first juvenile court judge in Halifax.

The concept of intervening where the family failed to provide for a Christian home for the proper maternal care of children was a central preoccupation of the juvenile court in these early years. Little concerned with the proportionality of intervening and sending a child to a reformatory for offences such as truancy – the most pervasive problem of the Juvenile court at the time<sup>574</sup> – the goal of the juvenile court was to intervene and to reform the child, whatever the offence that had been committed. And indeed, in the case of neglected children, who could receive the same reformatory treatment as delinquents, no offence had been committed at all. Even where the delinquent was convicted of being a “truant” these status offences involved little in the way of a crime as we know it today. The importance of having the neglected child before the Court was to stop the child from becoming a “future delinquent”,<sup>575</sup> and to ensure both the neglected child and the delinquent child had a good Christian upbringing, thereby safeguarding society against the future criminality of children in poverty.

The juvenile court as a probationary court was very informal and had little by way of procedure to ensure the due process rights of the children or their families. Juvenile

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<sup>574</sup> Nova Scotia, House of Assembly, Office of the Superintendent of Neglected and Dependent Children, “Seventh Annual Report” in *Journals of the House of Assembly*, Appendix No. 28 (1920) at 10-11. Out of 238 cases of delinquents before the courts, 76 of those were for the offence of truancy.

<sup>575</sup> Stephen Pfohl, “The Discovery of Child Abuse” (February 1977) 24:3 *Social Problems* 310 at 314.

court judges spoke not in a classical legal language, but at the beginning, in a moral/religious language and later in a more “scientific” psycho-legal language emerging from the field of social work. As has been observed of juvenile courts in other jurisdictions, the juvenile court in Halifax was becoming a site for socialized justice: its role was largely to legitimate the interventions of non-legal personnel to address delinquency and neglect – that is, to solve a larger social problem. These non-legal personnel included a mix of denominational personnel, charitable volunteers, social workers and medical personnel.<sup>576</sup> The term “socialized justice” originated with American Legal Realist<sup>577</sup> Roscoe Pound and, as Dorothy Chunn explains, was characterized by three distinct features:

[A]n emphasis on individualized treatment of the deviant, dependent, and potentially marginal; a growing reliance on non-lawyer ‘experts’ and individualizing devices such as juvenile and domestic-relations courts to design and implement treatment; and ‘a continually increasing resort to...administrative methods.’ The overall objective of socialized justice was ‘to maintain the general security through prevention and maintain the individual life through rehabilitation.’<sup>578</sup>

In the field of law and legal theory, the 1920s and 30s saw the expansion of legal realist thinking and the “sociological jurisprudence” movement in legal thought. Critical of classical liberalism, the realists exhorted legal experts and academics to adopt a view of law that understood the legal system as an embedded, as opposed to a hermetic, system of thought and practice.<sup>579</sup> Liberal legalism with its insistence on due process and patrolling

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<sup>576</sup>See Dorothy Chunn, *From Punishment to Doing Good: Family Courts and Socialized Justice in Ontario 1880-1940* (Toronto: University of Toronto Press, 1992).

<sup>577</sup> The legal realists believed that law could only effectively work upon society if it brought other knowledges such as psychology and economics into legal understanding. Counter to the work of the legal formalists, legal realists believed in the importance of social context for adjudicating upon disputes and in interpreting the effects of legislation on society.

<sup>578</sup> *Ibid* at 4.

<sup>579</sup> *Ibid*.

the negative liberty of the individual, maintained too sharp a line between the public and private realms.<sup>580</sup> Law conceived as a bulwark against state action could do little to address the mounting social problems of the time which were caused by the First World War, industrialization, and finally, the Depression.

Legal realists believed that in order for law to act upon society in a progressive way, legal experts had to become familiar with the fields of psychiatry, psychology, medicine, sociology, and social work.<sup>581</sup> Legal regulation was more effective if it was based not upon “legal prohibition/punishment” but on “normalization and social control”.<sup>582</sup> Dorothy Chunn, in her book, *From Punishment to Doing Good: Family Courts and Socialized Justice in Ontario 1880-1940*, explains how this normalizing justice was instituted in Ontario:

The heart of the emergent normalization grid, however, was not the institutions, but rather, the numerous community-based, individualized regulatory mechanisms of ‘social control,’ including juvenile and family courts, probation and parole, that operated in tandem with schools, private social agencies, and the police.<sup>583</sup>

While legal realism would have its heyday in mainstream academic legal thought in the 1920s and 30s, we can see that the experiment of sociological justice had already begun in the institution of juvenile delinquent regimes across Britain and North America early in the century. The introduction of the juvenile delinquency regime meant that the criminal regime of the police, stipendiary magistrates, and lawyers was displaced in the

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<sup>580</sup> See dissent of Oliver Wendell Holmes in *Lochner v New York* (1905), 198 US 45; Robert L Hale, “Coercion and Distribution in a Supposedly Non-Coercive State” (1923) 38.3 Pol Sci Q 470.

<sup>581</sup> See for example, Roscoe Pound, “Sociology of Law and Sociological Jurisprudence” (1943) 5 Univ Toronto LJ 1; David Kennedy, *The Canon of American Legal Thought* (Princeton: Princeton University Press, 2006).

<sup>582</sup> Chunn, *From Punishment to Doing Good*, *supra* note 576 at 19.

<sup>583</sup> *Ibid.*

lower courts by probation officers, social workers, psychiatrists and juvenile court judges who were attributed with special knowledge of the needs of children.

The normalization project in which these child specialists were increasingly becoming expert was to be the central focus of family and juvenile courts. Prevention and reform, as opposed to an after-the-fact trying of the evidence, would become their hallmark.<sup>584</sup> In the early years of the juvenile court reports we see the religious influence of the denominational institutions in the decision-making of the juvenile court judges. However, with the increasing attention to science in the institutions we begin to see a trickle down of scientific thought into the Court reports. The following excerpt from an article published in 1909 on juvenile courts is instructive for how this notion of socializing justice – the marriage of legal and psychological expertise – was meant to be carried out in the juvenile courts:

The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career. It is apparent at once that the ordinary legal evidence in a criminal court is not the sort of evidence to be heard in such a proceeding. A thorough investigation, usually made by the probation officer, will give the court much information bearing on the heredity and environment of the child. This, of course, will be supplemented in every possible way; but this alone is not enough. The physical and mental condition of the child must be known, for the relation between physical defects and criminality is very close. It is, therefore, of the utmost importance that there be attached to the court, as has been done in a few cities, a child study department, where every child, before hearing, shall be subjected to a thorough psycho-physical examination. In hundreds of cases the discovery and remedy of defective eyesight or hearing or some slight surgical operation will effectuate a complete change in the character of the lad. The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the court-room are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.<sup>585</sup> [emphasis added]

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<sup>584</sup> *Ibid* at 4.

<sup>585</sup> Mack, *supra* note 433 at 119 – 120.

The juvenile court reports show how the law served to impose upon society the psycho-medical knowledge developing in the institutions and how the court as a “probationary”, specialist court, was able to act outside of any regime of rights. Because cases prosecuted under the 1912 Act were not reported unless appealed (and even then there is no record of appealed cases), these juvenile court judicial reports are some of the only evidence we have of how the 1912 Act was interpreted. These early reports demonstrate the emphasis on the moral upbringing of children and the moralizing discourse of the undeserving poor. From these reports we can see that juvenile delinquents as opposed to neglected children comprised the majority of cases in the court.

Given the close connection and overlapping definitions of neglected child and juvenile delinquent, one can only speculate that the moral panic over juvenile delinquents<sup>586</sup> may have led the court to emphasize the “delinquent” aspect of each offender over the ubiquitous “neglected” aspect of each “delinquent’s” upbringing. What is also clear from these early reports is that the juvenile court saw its work more in terms of an extension of the reformatory work of the institutions than as a protector of children’s rights or family privacy. Procedures in the Court were quite informal. While the Act permitted witnesses to be called,<sup>587</sup> there was little trying of evidence,<sup>588</sup> if any, and it appears that there was little in terms of appeal<sup>589</sup> from the order of the juvenile court judge.

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<sup>586</sup> Boudreau, “Delinquents Often Become Criminals”, *supra* note 480 at 108.

<sup>587</sup> Section 40.

<sup>588</sup> See discussion below on juvenile courts.

<sup>589</sup> As will be discussed in the next chapter, appeals of the Juvenile court decisions tended to come by way of an application under the *Liberty of the Subject Act* RSNS 1923, c 231 – an application akin to a constitutional challenge, today.

The first report by Ernest Blois, the first Superintendent of Neglected and Delinquent Children, was submitted to the Legislature in 1914, covering the events of the calendar year 1913. The Superintendent reported that Children's Aid Societies had been organized under the provisions of the new 1912 Act in Springhill, Windsor, Wolfville, Yarmouth, Amherst and New Glasgow. The Superintendent also reported that the Society for the Prevention of Cruelty had also been approved as a Children's Aid Society in Halifax.<sup>590</sup> The report contained smaller reports from the heads of the various Children's Aid Societies as well as statistics on the various institutions in the province charged with the care of children. Statistics included how many children were in each institution, information about the physical structure of the institution, and information about the income and expenditures of the institutions.<sup>591</sup> The statistics also reported on how many of the children were crippled, feeble-minded, sickly, how many died and how many were attending school.<sup>592</sup> The annual report included statistics on how the children's aid societies disposed of cases of children brought into their care. Statistics compiled on the various institutions charged with the care of children reveal that in 1913, corporal punishment was used by the majority of institutions and solitary confinement was used as a method of punishment in a number of institutions.<sup>593</sup>

As an introduction to the work of child protection and the juvenile court, the first Annual Report of the Superintendent of Neglected and Delinquent Children contained a wealth of information as to what the juvenile delinquent regime saw as their role in society. The reports evidence a preoccupation with poverty and neglect as a prelude to delinquency

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<sup>590</sup> Nova Scotia, House of Assembly, Office of the Superintendent of Neglected and Dependent Children, "First Annual Report" in *Journals of the House of Assembly*, Appendix No 28 (1914) at 1.

<sup>591</sup> *Ibid* at 12-17.

<sup>592</sup> *Ibid*.

<sup>593</sup> *Ibid*.

and the role of both child welfare workers and the juvenile court in ensuring that the child is made a productive citizen. The following is an excerpt from the first report that appears to be a clipping from promotional material on children's aid at the time:

If you believe that a child living in squalid, filthy manner, without sufficient food and clothing, hearing vile language used by its parents, seeing its parents fighting, quarrelling, and drinking; and growing up without religious instruction, and secular education, has not a fair chance of becoming a useful citizen; and if you believe that such a child is very likely to become a delinquent – a menace to society - and if you believe that a child who spends its early life amid such surroundings is almost sure to develop into a poorer type of citizen than the well born and bred child; if, I say, you believe these things, get busy. Join the child welfare movement. Help by voice, purse, and labor, every movement designed to better the child life of the nation.<sup>594</sup>

It is clear from the first report of the juvenile court judge of Halifax that the role of the Juvenile court at that time was not to act as a neutral arbiter of rights, securing the liberty of the child and the family, but rather as a “remedial agency” charged with prevention and treatment. The juvenile court, created under the 1908 JDA was meant to be a court heavily reliant on the probation system and informal in its procedure. The “probation system” as contemplated by the work of the juvenile court was actually closer to current child protection practices than what is today understood by probation. The following is an excerpt on what constituted probation in the juvenile court in the early years of the court:

The only probation worth considering is that which works a change in the child's life, so that it grows to be a healthy, normal, member of society. In order that this may be accomplished there must be something more than formal visits between child and officer. The probation officer must become a controlling influence in the child's life: the home must be visited; the family life studied; the child's history learned; its physical and mental condition determined; the child's environment must be considered. It is absolutely necessary that the probation officer should

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<sup>594</sup> *Ibid* at 24.

have a complete plan of the child's life. The good will and cooperation of the parents and the complete confidence of the child must be secured.<sup>595</sup>

The introductory paragraphs from Judge Wallace's report are particularly enlightening as to the close connection between the Court's work and the work of the Society, not to mention the lack of procedural safeguards at the court:

The Juvenile court for the city of Halifax has been in existence since February 1911. Its aim has been to search out the underlying causes of juvenile delinquency and to supply preventative measures. It has availed itself of the probation system, and, wherever possible has tried to prevent children from reaching a condition which would necessitate their being formally dealt with by the Court. The ultimate success of this remedial agency depends more on the number of children kept out of court than brought into it.

The procedure often begins before any offence has been committed. When it is reported that a boy or girl is inclined to be wayward, or is being brought up without salutary parental control, the Superintendent of Neglected and Delinquent Children, who is an officer of the court, investigates the report, confers with the parents of the boy or girl and, often, by such action, renders unnecessary the summoning of the boy or girl or parents. In some cases an appropriate admonition to the delinquent or the parents is sufficient....

The proceedings of the Court are not reported in the press, and care is taken, where children are "brought before the Court" to exclude anything like the appearance of criminal procedure and terminology. The boy or girl is not formally asked whether he or she is "guilty or not guilty" but is encouraged to tell the truth, and, as a rule, when the delinquent is thus treated, the particular fault is admitted. Sometimes counsel appear on behalf of the children or their parents, and it is gratifying to report that counsel in such cases invariably have co-operated with the Court in conducting the inquiry absolutely free from any technicalities, and in accordance with the policy of the Court not to hold "trials" but earnest conferences concerning the child's condition and future welfare.<sup>596</sup>

From Judge Wallace's description and from descriptions contained in other reports it is evident that the Juvenile court had little in the way of formal processes. One

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<sup>595</sup> *Ibid* at 20.

<sup>596</sup> *Ibid* at 30.



description written in 1915 stated that there were no formal pleadings in court and lawyers were rarely present.<sup>597</sup>

Judge Wallace was clear as to what he saw as the root of juvenile delinquency: poverty, intemperance and the lack of religious education. He reported that out of 480 cases tried by the Court since its inception in February 1911, 75% of those cases were due to “defective home conditions involving, as a rule, criminal carelessness or moral obtuseness of the parent.”<sup>598</sup> While Judge Wallace recognized that, “In some instances they are the product of social conditions for the maintenance of which municipalities are responsible” he ultimately concluded that “[in] the vast majority of cases the parents are to blame.”<sup>599</sup> Interestingly, we see in this report a recognition of the condition of “feeble-mindedness” and physical and mental defects as the cause behind delinquency – however, only in the minority of cases.<sup>600</sup>

The reports of the juvenile court judge from the Annual Reports to the Legislature are replete with these speculations as to the cause of delinquency. These lower courts saw their roles not simply in terms of adjudicating upon the presence or absence of the grounds to find a child to be neglected or delinquent, but rather, their role was to articulate the causes of this neglect or delinquency and to set out an appropriate remedy. The causes for neglect and delinquency included: the absence of discipline in the home;<sup>601</sup> the failure of

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<sup>597</sup> Nova Scotia, House of Assembly, Office of the Superintendent of Neglected and Dependent Children, “Third Annual Report” in *Journals of the House of Assembly*, Appendix No 28 (1916) at 38.

<sup>598</sup> *Ibid* at 40-43.

<sup>599</sup> *Ibid* at 30.

<sup>600</sup> *Ibid* at 32.

<sup>601</sup> Nova Scotia, House of Assembly, Office of the Superintendent of Neglected and Dependent Children, “Second Annual Report” in *Journals of the House of Assembly*, Appendix No 28 (1915) at 31.

the parent to properly chastise the child;<sup>602</sup> the failure of the wife to keep a proper home;<sup>603</sup> mental defects;<sup>604</sup> husbands who were wife deserters, professional criminals or habitual drunkards;<sup>605</sup> and spoiled children.<sup>606</sup> Even though these “causes” of delinquency, which dominate the early reports of the Juvenile court, are couched in moralistic terms, the hallmarks of poverty are quite clear. Judge Wallace is quite open in these reports that the greatest problem facing the Court is child poverty – his analysis of the cause of poverty, however, is not overarching socio-economic conditions, but a failure of parental responsibility. A particularly illuminating piece on causes of delinquency was included by Wallace in the third annual report:

The toughest problem which the Juvenile court is called upon to deal with is the not infrequent case of a husband who deserts his wife and seems willing to let her and his children starve rather than support them. To send such a man to jail does not solve the problem. The punishment falls upon the innocent wife and children more heavily than upon the guilty father. They share his punishment without his guilt. The good men and women of this country should unite and demand such legislation as would enable these men to work at remunerated labor of some kind while in prison. Money thus earned could be credited to prisoners and made available for aiding their families in need.<sup>607</sup>

As of 1917, the juvenile court judge was still seeing the problem of delinquency and neglect in Victorian terms – as the problem of deserting and intemperate husbands leaving their wives and children to a life of moral degeneration. The tone of the report of the juvenile

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<sup>602</sup> *Ibid.*

<sup>603</sup> *Ibid.*

<sup>604</sup> *Ibid.*

<sup>605</sup> Nova Scotia, House of Assembly, Office of the Superintendent of Neglected and Dependent Children, “Third Annual Report” in *Journals of the House of Assembly*, Appendix No 28 (1916) at 44.

<sup>606</sup> *Ibid* at 45.

<sup>607</sup> *Ibid* at 44.

court judge in the years following up until the 1920s continued to stress that immoral, irreligious households were the primary cause of juvenile delinquency.

But this focus by some judges on intemperate fathers does not mean that neglect was not also tied to poor mothering. In the 1919 Annual Report Judge Hunt of the Halifax juvenile court admitted that one of the causes of delinquency can be traced back to the “recent terrible war” and the demoralizing effects it had. However, he then went on to blame incompetent mothering as a second cause of this delinquency and neglect. After noting that cases of delinquency had risen from 190 cases in the previous year to 238 cases in 1919, Hunt laid out his two causes for this rise:

In seeking for a cause, perhaps one or two reasons may be fairly admitted. One we may find, as the result of the recent terrible war. War is always demoralizing, through it we become familiar with cruelties and spoilage. The minds of our youths become corrupted with what they see and hear, and in short time are felt results that fill us with alarm and dread.

Another cause may, I think be found, in poor and neglected homes, the consequence of which are neglected children. There are scores of homes in our City where the father of a family is compelled to be away all day earning a livelihood, and where the mother neglecting her family duties is found too often spending her time in some of our many places of amusement. Such homes are breeding grounds of crime. Given good mothers we have little to fear from neglected homes and from influences that go so often to ruin the brightest lives. Incapable and incompetent mothers make homelife so distasteful and repugnant to their children that the attraction of the street soon becomes stronger than the attractions of home and as a consequence children find their amusement and their companions outside of the home amid temptations and surroundings that tend to make disorder and crime. It is hoped that some means can be devised to give advice and help under such circumstances. If we are able to make progress in the right direction we must begin at the home. It is well known from homes where are found good mothers there our most successful men have had their start in life.<sup>608</sup>

Judge Hunt was also clear about the causes of delinquency and neglect: poor and neglected homes produce poor and neglected children and incompetent mothers are responsible for this poverty. While he recognizes that the Great War had an effect on

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<sup>608</sup> Nova Scotia, House of Assembly, Office of the Superintendent of Neglected and Dependent Children, “Sixth Annual Report” in *Journals of the House of Assembly*, Appendix No 28 (1919) at 15-16.

society, the effect is to demoralize and corrupt the minds of youth. As for poverty and the social problems that lead to neglect, these he lays at the feet of incompetent mothers. In answer to these causes, Hunt stresses the importance of religious education and teaching a child “his or her accountability to God” and the importance of children understanding that the “real life consists of service. They are saved to serve.”<sup>609</sup>

The private philanthropic discourses of temperance, and Christian morality were alive and well in the juvenile courts in the years during and just after the Halifax Explosion and the Great War. However, these ideas had already become anachronistic. The conditions for thinking and speaking in a more “scientific” and objective way about delinquency and neglect had begun to emerge in the human sciences. This scientific thinking would have a tremendous effect on the “socialized justice” that was beginning to emerge from the court and that would come to have a lasting effect on child protection law and jurisprudence.

By the 1920s there were two juvenile courts in the Province: one in Halifax and one in New Glasgow. By November 1925<sup>610</sup> the Superintendent of Neglected and Delinquent Children, Ernest Blois, had become the judge of the juvenile court in Halifax. The procedures and practices of the Juvenile court continued to be informal as in the earlier years of the Court under Judges Wallace and Hunt. Judge Blois saw his role as deciding upon the welfare of the child – a role he would also have undertaken in his parallel role as Superintendent of Neglected and Delinquent Children – however, with the imprimatur of law at his disposal. In his 1926 Annual Report he wrote:

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<sup>609</sup> Nova Scotia, House of Assembly, Office of the Superintendent of Neglected and Dependent Children, “Third Annual Report” in *Journals of the House of Assembly*, Appendix No 28 (1916) at 17.

<sup>610</sup> Nova Scotia, House of Assembly, Office of the Superintendent of Neglected and Dependent Children, “Fourteenth Annual Report” in *Journals of the House of Assembly*, Appendix No 28 (1927) at 80.

It may only require a few minutes to decide whether a boy is guilty of a particular offence, indeed in ninety-five percent of the cases he will readily admit his guilt, but the problem as to what is to be done about it, not only in the child's interest but in the interest of the community, is often a very difficult one and requires much consideration.<sup>611</sup>

There is little sense of due process or proportionality in Blois's decisions. For example, in his Annual Report for 1927 he indicates that for even a first offence a boy could be removed from the home and placed in a reformatory:

In the Court for the City of Halifax, a complaint is usually taken in the ordinary way and either a notice sent to the parents asking them to appear at a certain time with the child, or a formal summons is issued with the prescribed notice to parents. Only on extremely rare occasions is a warrant issued, possibly not more than one or two during the year. The courtroom is an ordinary office, without any of the furniture or appointments usually distinguishing a court room. Those present besides the judge, the parents and the boy usually consist of a probation officer and the person making the complaint. Witnesses are called in as occasion requires. The whole proceedings are simple but in conformity with the Statute. Evidence is taken on oath. In most cases where a boy will stoutly deny the charges even in the face of overwhelming evidence against him.

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Probation may be extended to a boy who has several delinquency records against him; on the other hand a first offence may send a boy to the reformatory or to a foster home, the controlling factors being, the character and attitude of the boy's parents, or guardian, and the environment in which he is living together with the probable effect of the boy's release on probation upon other boys in the neighbourhood and the rights of the citizens to protection. Parents who show a disposition to work with the Court to prevent further delinquencies are usually given custody of their boy under probation, but where the Court is convinced that the parents are more concerned with getting their boy "off" by any hook or crook, and where their whole attitude shows that that the offence committed is not what they are ashamed of or regret...probation methods cannot be successfully applied.<sup>612</sup>

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<sup>611</sup> *Ibid* at 85.

<sup>612</sup> Nova Scotia, House of Assembly, Office of the Superintendent of Neglected and Dependent Children, "Fifteenth Annual Report" in *Journals of the House of Assembly*, Appendix No 28 (1928) at LXXXV.

Furthermore, there is no mention of legal counsel for delinquents in Judge Blois' description of court procedure, nor does he seem sympathetic to the idea of parents who try to plead their child's case and "get their child off". Once a child was accused, there was little hope of stopping the system from intervening.

The purpose of flexibility in legal proceedings was to allow non-legal experts to work with children in a probationary or reformatory fashion, rather than punishing children and sending them to jail. Legal expertise was in fact undervalued at the court in favour of more socially-minded disciplines such as social work and psychiatry. Judge Blois did not have legal training, but rather, had trained and worked as a school teacher before becoming the School Superintendent in 1906 and then the Superintendent of Neglected and Dependent Children and Chief Probation Officer of the Juvenile court in 1912.<sup>613</sup>

Of interest at the juvenile court was not testing the evidence to ensure that state intervention into the family and the deprivation of the liberty of both child and parent was warranted, but rather intervention was assumed to be warranted and as Judge Blois states above, the only outstanding question was: what is to be done in the child's and in the community's interest? It is difficult when reading the reports of Judge Blois and knowing that he was also the Superintendent of Neglected and Dependent Children, to conceive of what purpose the juvenile court was serving besides what we see today as the work of the children's aid societies. As he was also the head of child welfare in his executive function, as well as the judge of the juvenile court, there was no distinction between the executive activity of the Department and the legal activity of the courts. The court served neither as a check on executive power, nor as a strident defender of liberty

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<sup>613</sup> Fred MacKinnon, "Life and Times of Ernest Blois", available online: <<http://www15.pair.com/buchanan/genes/docs/ernblois.htm>>.

rights. Its central goal was to ensure that children who currently were or potentially could serve to disturb order in the city were sent to the appropriate institutions, or placed under probationary supervision in the care of their families, with the aim of socializing and disciplining these children to become industrious, productive and well governed citizens.

In particular, Judge Blois' reports from this time evidence the increasing attention paid by societies and institutions to science, medicine and the expert field of social work making its way into his decisions. His juvenile court reports indicate that he was of the mind that a scientific approach was the proper approach to finally addressing the causes of delinquency of children that were mentally and emotionally "unfit". In this quotation we see him bemoaning the use of time limits on intervention as standing in the way of a scientific approach to effectively "treating" delinquency:

Another matter which should be better understood by the general public is the mental and emotional condition of many of these delinquents. The Court is thoroughly aware that a certain boy is mentally unfit, or may be emotionally unstable, and ought not to be at large, because he is incapable of taking care of himself or adjusting himself to society: the reformatory institutions are well aware of these facts and they do not recommend his release but there is a time limit for his detention and there is also the question of the expense of his maintenance, no inconsiderable matter. The result is that many boys and girls are released from these reformatory institutions when the Court and the institutions know perfectly well that they will very soon become lawbreakers and if within the age be returned, or if over the age find their way into the police courts, jails and penitentiaries. This is obviously a foolish policy to pursue, and the wonder is that the State has so long and so persistently followed it. Society is not willing, apparently, to pay the price for a sound scientific treatment of juvenile delinquency and crime prevention.<sup>614</sup>

What is also noticeable by the mid-1920s is that the juvenile court was almost wholly reserved for juvenile delinquents as opposed to neglected children. For example, in 1927, there were 144 cases involving juvenile delinquents before the court and only 20

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<sup>614</sup> Nova Scotia, House of Assembly, Office of the Superintendent of Neglected and Dependent Children, "Fifteenth Annual Report" in *Journals of the House of Assembly*, Appendix No 28 (1928) at LXXXVII.

cases involving neglected children.<sup>615</sup> By 1929, 213 cases heard at the Halifax Juvenile court were labeled delinquent and 21 were neglected.<sup>616</sup> Very rarely would Judge Blois or the Provincial Psychiatrist even report on neglected children – the focus being exclusively on the causes and treatment of delinquency.

An obvious reason for this, was that there was little differentiation in the work of the society and the juvenile court based upon whether or not a child was a delinquent or a neglected child. Indeed, as mentioned, as Judge Blois said himself at the first Nova Scotian child welfare conference in 1926: “there really should not be two groups of children namely neglected and delinquents. Children do not become delinquents except by reason of neglect of one kind or another.”<sup>617</sup> Treatment of the delinquent or neglected child would be virtually the same: both may be sent to a foster home or to a reformatory depending on what the Court and the society felt were in the child’s best interests.<sup>618</sup>

Furthermore, as indicated above, just because the juvenile delinquent was in the courtroom and charged with an offence did not mean that he or she was “innocent until proven guilty” or that they were given a trial. As Judge Blois quite plainly states above, proceedings were informal and most of the time the child would merely “admit” to the offence. What constituted an “offence” for the purposes of delinquency was also quite

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<sup>615</sup> Nova Scotia, House of Assembly, Office of the Superintendent of Neglected and Dependent Children, “Sixteenth Annual Report” in *Journals of the House of Assembly*, Appendix No 28 (1929) at 70.

<sup>616</sup> Nova Scotia, House of Assembly, Office of the Superintendent of Neglected and Dependent Children, “Seventeenth Annual Report” in *Journals of the House of Assembly*, Appendix No 28 (1930) at 84-85.

<sup>617</sup> Nova Scotia, Minister of Public Welfare, *The Nova Scotia Association of Children's Aid Societies: 1926-1956*, Publication #4 (Halifax: Minister of Public Welfare, 1972) at 109.

<sup>618</sup> Nova Scotia, House of Assembly, Office of the Superintendent of Neglected and Dependent Children, “Fifteenth Annual Report” in *Journals of the House of Assembly*, Appendix No 28 (1928) at LXXX.



significant. For one thing, truancy comprised the largest caseload of juvenile delinquents. Given the fact that a “neglected” child was one that did not have “salutary parental supervision” or came from an “unfit home” it is not difficult to see how a neglected child would soon come to be labeled a “delinquent child”. Indeed the terms are quite interchangeable. The link between poverty and criminality was maintained, although within a scientific or objective frame.<sup>619</sup> Whether a child was labeled “delinquent” or “neglected”, the role of the court was to legitimize and reinforce the work of non-legal experts such as psychiatrists and social workers to help normalize the child and assure his proper integration into society.

The juvenile court was positioned as a specialist court within a larger child welfare regime and articulated judgments with a claim to have authority over child welfare knowledge. Adjudicating on the presence or absence of neglect or delinquency was not the main aim of the Court. Even though the court and its legislation structured juvenile delinquent and child protection proceedings very much in criminal law terms, the Court was little concerned with the actual fact of the offence. The probationary, remedial nature of the Court meant it was almost wholly focused on whether the child was the type of child with which the court should be concerned and not on testing state intervention. Once the court was satisfied that it was dealing with a “neglected” child or “delinquent” child, the goal for the juvenile court judge was to determine what was in the child’s welfare. Legal expertise and liberal legalist limits on intervention are seen only as barriers to determining and facilitating this welfare.

The source of authority to proclaim what constituted the welfare of the child came from the same place that the institutions and societies were gaining their claims to specialist knowledge – this mix of denominational, philanthropic, medical and psychiatric

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<sup>619</sup> See Chunn, *From Punishment to Doing Good*, *supra* note 576 at 19-20.

expertise. By working upon this body of knowledge without subjecting it to scrutiny, the legal decisions that emanated from the juvenile court provided this body of knowledge with the force of law and the force of objective truth. Furthermore, in failing to scrutinize the work of the professionals in the institutions as interventions which might call into question the liberal rights of the individual, the court served to de-politicize the work that was being performed in the institutions. However, the institutions and their personnel had the decidedly governmental role of removing children from the home and institutionalizing them where they would be socialized to become productive citizens who would not be a charge on the state. The ways and means of this socialization, as we have seen, reinforced existing power relations in society. Failing to scrutinize these interventions reinforced the apolitical character of this disciplinary regime and rendered the juvenile court with the very political function of maintaining the status quo as far as gendered, classed, raced and ablest politics were concerned.

In turn, the body of knowledge which sought to define the welfare of the child in medicalized and scientific terms provided the legal concept of welfare in public custody disputes with identifiable, increasingly objective content. This child development expertise therefore helped to legitimate the role of the juvenile court as a specialist court capable of passing judgment on the children and families within its charge.

It would not be until more than a decade after the development of the juvenile courts when a liberal rights challenge was made at the Superior Courts. By 1926 the Superior Courts were starting to challenge juvenile court decisions on the basis of denial of liberty and due process rights. Superior Courts were often not accessible to families in poverty. The cases in which the Superior Courts did hear and uphold a challenge to the juvenile courts were few and far between. In this way we can understand that lack of access of poor families to upper courts, and their relegation to the lower courts, was part of an overall regime to regulate families in poverty.

### **Socialized Justice versus Liberal Legalism: 1926-1940**

As the Juvenile court became more interested in treating and socializing the child as future citizen and in safeguarding society from the delinquency of children, we see a marked break with classical liberal legalism. As opposed to ensuring the negative liberty of the subject and patrolling the boundary between the public sphere of the state and the private sphere of the family, the juvenile court treated liberal legalism— its need for due process, the proper trying of evidence, and state’s burden of proof – as a hindrance, rather than as a necessary component to its work. This brought the work of the juvenile court into direct conflict with the dictates of liberal rule of law thinking. Between the years 1926-1940, the Supreme Court of Nova Scotia reacted to the lack of due process evident in Judge Blois’ court with the articulation of an early liberal rights critique of the juvenile court and a warning for greater procedural fairness in the courtroom. Unfortunately, the beginning of this liberal rights discourse also marks the end of reported decisions of the juvenile court in the Annual Reports. We can see from the appeal decisions in the Supreme Court reports, however, that up into the 1940s, Juvenile courts continued to show a marked lack of traditional due process and respect for liberal rights.

The first case in the “liberal rights jurisprudence” of the Supreme Court was *Re Mailman*<sup>620</sup>. *Re Mailman* involved Dorothy Mailman, a girl of sixteen years of age who had been found to be a neglected child pursuant to s. 22 of the 1923 Act.<sup>621</sup> On appeal to the Supreme Court, counsel for the mother argued that Dorothy was not a neglected child and that the requirements of the Act were not met. In particular, he argued that: there was no

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<sup>620</sup> (1926) NSR 61.

<sup>621</sup> *Children’s Protection Act*, RSNS 1923, c 166.

evidence that the home was an unfit home; there was no proper adjudication of the case; only one magistrate and not two as required by the Act heard the case; no evidence was taken before the judge; there was no sworn evidence; and although the mother asked the agent to return later when the father came home from work, the agent insisted on serving the mother with notice.<sup>622</sup> Counsel for the agent, Mr. Prosser, argued that *prima facie* the proceedings were properly taken and that the agent was entitled to serve the mother as she was liable to maintain the child under the *Poor Law*.<sup>623</sup>

In allowing the appeal and ordering the discharge of Dorothy Mailman to her mother, Graham J. for the Court found that:

The hearing [by the justice of the peace] was of a most informal character. The girl is said to have answered some questions put to her by the agent of the society. Whether what she said shewed her amenable to the law or not is not clear...Whatever merits may be, the whole affair appears to have been conducted without regard to elementary principles for the conduct of judicial proceedings. The case was heard on the footing of a return having been made by the society to an order under the Act.<sup>624</sup>

In particular, the Court found that there was no record of complaint, evidence or finding in the case at all; that only one justice of the peace was present at the hearing although two signed the order; and the mother was afforded no opportunity to “prepare a defence” to the charge.<sup>625</sup> Justice Graham noted that the “wife, a sick and illiterate woman, attended the hearing, stated that her husband would be home that afternoon, and asked that the enquiry be postponed until his return”.<sup>626</sup> Evidently, the hearing was not

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<sup>622</sup> *Mailman, supra note 620* at 62-63.

<sup>623</sup> *Ibid* at 63.

<sup>624</sup> *Ibid*.

<sup>625</sup> *Ibid* at 63-64.

<sup>626</sup> *Ibid*.

postponed and the child was found to be a neglected child and committed to the care of the Society.

The Court allowed the appeal on the grounds that there had been such a denial of natural justice as to render the proceedings null and void. It is noteworthy that the Court did not review the merits of the finding that the girl was a neglected child under the Act nor did it discuss what facts would have to be present in order to make such a finding. Instead, the Court based its decision very clearly on the lack of due process and the informality of court proceedings. The Court found that the procedural informality was of such a grievous nature that the court could not justify holding the child. It is evident from the dicta of this case that the Mailmans were a poor family – Mrs. Mailman is described as a “sick and illiterate woman” and Mr. Mailman was a “labourer employed in the lumber woods and was sometimes necessarily absent from home.”<sup>627</sup> While on the one hand the Court was signaling to the juvenile court that it must abide by the rules of natural justice, it was also signaling caution in treading on the sanctity of family privacy of the “deserving”, that is, the industrious, working poor.<sup>628</sup>

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<sup>627</sup> *Ibid.*

<sup>628</sup> The scope of the procedural irregularities that the Court was willing to insist on, however, had its limits. The case of Mailman can be contrasted to the appeal on the basis of procedural irregularity in the case of *The King v Wilfred L St Peters* (1927) NSR 198, brought the year after the Mailman case. In *St. Peters*, the same composition of the Supreme Court denied another *habeas corpus* application that was brought on the basis of a technicality about whether or not Judge Blois had the jurisdiction under the Juvenile Delinquents Act, 1908 to convict and sentence the juvenile delinquent. It was argued that it had not been proved in Juvenile court that the proclamation bringing the Juvenile Delinquents Act, 1908 into force had ever been published in the Canada Gazette. The Court denied the *habeus corpus* application on these grounds, holding that “There is a presumption of regularity in support of the authority of the judge” and that “proof of the proclamation was not relevant to any issue which was to be tried by the judge”. While Court was willing to allow *habeas corpus* application on the basis of the absence of natural justice evidenced in *Mailman*, it was not willing to allow an application on a mere technicality.

In the 1940 case of *Re Wasson*<sup>629</sup>, the Supreme Court again insists on greater due process rights in cases where the liberty of the subject is deprived by the juvenile court. The case of Wasson involved another *habeus corpus* application under the *Liberty of the Subject Act*<sup>630</sup> to release Phyllis Wasson, a fifteen year old girl, from the Maritime Home for Girls. Wasson was found guilty under the *Juvenile Delinquents Act, 1908* for receiving stolen money knowing it to be stolen.<sup>631</sup> Counsel for Wasson argued that proper notice of the hearing before the juvenile court judge had not been provided to the mother of Wasson. The case was appealed up to Supreme Court after Hall J. in Chambers dismissed the application on hearing the deposition of Lillian McBurney, a domestic servant in the charge of Wasson's mother. McBurney swore that she was asked by Wasson's mother to go to Court with Wasson as the mother was unable to attend court because she was sick. McBurney attended with the child Wasson and Wasson was convicted and sent to the Maritime Home for Girls.<sup>632</sup> Justice Hall had found that based upon the testimony of Ms. McBurney, Mrs. Wasson had been given due notice of the hearing.<sup>633</sup>

The Crown argued that section 17(2) of the *Juvenile Delinquent's Act, 1908* applied and cured the defect of lack of notice where the notice was acted upon. Having McBurney appear in court was proof that the notice was acted upon. Section 17(2) of the *Juvenile Delinquent's Act, 1908* provided:

17(2) No adjudication or action of a juvenile court with respect to a child shall be quashed or set aside because of any informality or irregularity where it appears that the disposition of the case was in the best interests of the child.

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<sup>629</sup> (1940) 14 MPR 405.

<sup>630</sup> RSNS 1923, c 231.

<sup>631</sup> *Wasson*, *supra* note 629 at 405.

<sup>632</sup> *Ibid* at 406.

<sup>633</sup> *Ibid*.

In a unanimous decision, the Supreme Court allowed Wasson's appeal and ordered her released from custody. The Court held that proper notice had to be effected in writing. Justice Doull held that,

I do not think that the want of notice is a mere irregularity or informality. It is a requirement, the neglect of which may lead to grave abuses. It is to be remembered that these Courts are held in private and that newspapers are forbidden to publish reports thereof except under severe restrictions.

While I regret that I will interfere with a disposition of the child, which may have been the best possible, I have reached the conclusion that she must be discharged.<sup>634</sup>

Not only was the Supreme Court at this time willing to interfere with the decision of the juvenile court judge on the basis of procedural fairness, but we see in the case of *R. v. McCorry*<sup>635</sup> the Supreme Court overturning a ruling of Judge Blois on the merits. In *McCorry*, the accused was convicted by Judge Blois that she did "knowingly omit to provide care and maintenance for a child, John McCorry, a child under the age of sixteen years and did thereby cause said child to become neglected".<sup>636</sup> McCorry was sentenced to three months imprisonment. The case was appealed to the County Court judge who upheld the conviction but did not provide reasons. This decision was then appealed to the Supreme Court.

In allowing the appeal, Carroll J. for the majority of the Court held that the Crown had failed to show that McCorry had "knowingly omitted to provide care and maintenance for the child and also that as a result of the omission the child became a neglected child within the meaning of the statute."<sup>637</sup> The facts of the case, as recited by Carroll J. were

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<sup>634</sup> *Ibid* at 409.

<sup>635</sup> (1933) 6 MPR 528.

<sup>636</sup> *Ibid*.

<sup>637</sup> *Ibid* at 529.

that the father had care and custody of the child but then lost his job and was no longer able to care for the child. The father then handed the child over to a Mr. Keller with the understanding that if he was satisfied with the child he would adopt the child. However, Keller decided he did not want to adopt the child and notified the father that he would find another place for the child. After being unable to find a place for the child, Keller handed the child over to the children's aid society. The CAS then laid the charge against McCorry for contributing to a child becoming a neglected child.

The Supreme Court was not willing to commit a father to jail for losing his job and having to give his child away potentially for adoption. Justice Carroll held that "The whole record indicates that the father, the accused, was endeavouring to look after the child, or have someone look after it, and in no sense can it be fairly said that it was deserted by its parents."<sup>638</sup> The Court was unwilling to set a precedent that parents who were morally blameless will be sent to prison if they lost their jobs and failed to be able to provide financially for their children. Justice Carroll stated at one point, "I presume the statute only embraces cases where a person has it within his power to provide care and maintenance."<sup>639</sup> In this case, the Court found that McCorry was not withholding maintenance, he simply could not provide it. While he may "knowingly" have omitted to provide care for his son, the Supreme Court was again insisting that it would not deprive him of his liberty without some evidence that he "willingly" failed to provide care.

By 1936 the Supreme Court insisted further on the separation of immorality and poverty. The Court held that not only did the Juvenile court have to show actual immoral conduct on the part of a parent or guardian, but it also had to show some connection

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<sup>638</sup> *Ibid* at 530.

<sup>639</sup> *Ibid* at 529.



between this conduct and the delinquency of the child in order to make a finding of contributing to delinquency. In the 1936 case of *Re McDonald*<sup>640</sup>, the Court allowed an application for “discharge from imprisonment” pursuant to the *Liberty of the Subject Act*, on the basis of insufficiency of evidence. The accused was charged under s 33(1) of the *Juvenile Delinquents’ Act, 1908* for contributing to a child becoming a juvenile delinquent. The child in question was seventeen months old when the accused had sexual intercourse with the child’s mother: “a woman not his wife,”<sup>641</sup> in the presence of the child. The accused was then charged under the *Juvenile Delinquents’ Act* with contributing to delinquency. The Crown argued that s 33(4) of the Act was a bar to the accused using the age of the child as a defense to the crime. Section 33(4) of the *Juvenile Delinquent’s Act, 1908* provided:

It shall not be a valid defence to a prosecution under this section either that the child is of too tender years to understand or appreciate the nature or effect of the conduct of the accused, or that notwithstanding the conduct of the accused the child did not in fact become a juvenile delinquent.<sup>642</sup>

In the Court’s dissenting opinion, Hall J. found that this section, particularly the provision that the child was of too tender years to understand or appreciate the nature or effect of the conduct of the accused, was a direct answer to the accused’s arguments. In contrast, the majority of the Court, written by Graham J. held that:

In many cases no direct evidence is given to establish [that the act contributed to a child becoming a juvenile delinquent], but the Court, infers from the age or appearance of the child, that it would or might understand its nature and be influenced by it. In this case, however there was not only no direct evidence, but there could be no inferential evidence.<sup>643</sup>

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<sup>640</sup> (1936) 11 MPR 91.

<sup>641</sup> *Ibid* at 95.

<sup>642</sup> *Ibid*.

<sup>643</sup> *Ibid* at 94.

The Court insisted that it was not weighing the evidence, thereby turning the case into an appeal – which was precluded by s. 33(4) of the Act – but rather, that pursuant to s. 8 of the *Liberty of the Subject Act* it was entitled to consider the sufficiency of evidence and whether the Crown had proved a *prima facie* case against the accused.<sup>644</sup> The majority of the Court felt the rights of the accused outweighed s. 33(4) of the *Juvenile Delinquents Act* and essentially found that the first half of the provision violated the provisions of the *Liberty of the Subject Act*. That the child understood the nature and effect of the act was an integral element to the offence and without it there was no offence and no justification for depriving the accused of their liberty. The Court insisted that without this element, the offence was simply an immoral act, and not necessarily a crime – an important distinction to be made at the time. The liberal sentiment here is quite plain – due process, notice, sufficiency of evidence, and proper representation would all be required in order to bring juvenile court decisions in line with the rule of law. An individual sphere of privacy and liberty had to be maintained and could only be intruded upon when it could be shown that the individual was accorded their due process rights.

### **Conclusion**

While in Chapter 2 we saw that the introduction of child protection legislation was a way to regulate the behaviour of children without having to punish the children themselves, the child before the juvenile court was understood as being in need of reform himself, lest he become a future criminal. As with child protection work in other Western countries, child protection work in the early decades of the 20<sup>th</sup> century saw little differentiation between the neglected child and the delinquent:

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<sup>644</sup> *Ibid.*

...there is little or no difference in character or needs between the neglected and the delinquent child. It is often a mere accident whether he is brought before the court because he is wandering or beyond control or because he has committed some offence. Neglect leads to delinquency and delinquency is often the direct outcome of neglect.<sup>645</sup>

The Halifax Explosion, First World War and then the Great Depression brought a new level of social dislocation to the city of Halifax and a concerted effort on the part of law and society to control children of the poor as risks to the social order.<sup>646</sup> While the *Prevention and Punishment of Cruelty to Children Act* focused adjudication on parental acts and transgressions, the juvenile delinquent regime focused on the child as the transgressor and potential future criminal. Furthermore, with the *Prevention and Punishment of Wrongs to Children Act*, a focus on parental fault served to reinforce the idea that responsibility for the control and proper socialization of children lay with the parents themselves. With the institutional nature of juvenile delinquent regime, the public sphere accepted and took on responsibility for the socialization of the children of the poor.

The legal realist critique of a strict public/private divide and liberalism's insistence on a sphere of negative liberty, had given rise to a regime of socializing justice of which the juvenile delinquent regime was an early example. The critique that socializing justice posed to liberal legalism held essentially that while enforcing the civil rights of the children and parents that came before the juvenile court would assist them in the short term, this guarantee of rights would have done very little to keep them from having to rely upon charitable assistance in the long term. The very point of socializing justice was to realize the limits of liberal legalism in addressing the social problems confronted by society. The professionals and volunteers that worked within the child protection system were working for what they saw as the welfare of children. The creation of denominational and non-

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<sup>645</sup> England, *Report of the Departmental Committee on the Treatment of Young Offenders* (Home Office, 1927) at 71.

<sup>646</sup> Boudreau, *City of Order*, *supra* note 373.

denominational institutions in Halifax and the childcare work carried out within them and within the juvenile delinquency regime, in general, no doubt assisted a many children in poverty, ensuring they received shelter, food and an education they probably would not have otherwise received. Many families voluntarily placed their children within these institutions because they did not have the means to care for them themselves.<sup>647</sup>

While responsibility for the children of the poor was accepted as a legitimate responsibility for the public sphere,<sup>648</sup> this does not mean that there was general acceptance that fault for poverty and marginalization could be ascribed to social, economic and structural risks. Criminalizing the behaviour of children in poverty and then taking responsibility for their “proper” socialization served to reproduce moralizing and normalizing judgments about class, race, ability, gender and sexuality. Intemperate fathers and incompetent mothers were openly expressed in the juvenile court reports to be the causes of delinquency and neglect. But this negative construction of parents in poverty intersected with racist and patriarchal ideas without juvenile court judges overtly addressing race or gender. In this era of socializing justice, medical and psychiatric expertise formed the content of the welfare of the child standard in juvenile court jurisprudence. However, in issuing juvenile court reports which articulated the causes of delinquency and neglect and the welfare of children in medicalized terms such as “feeble-

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<sup>647</sup> See discussion of the work of the city missions, for example, in Fingard, *Victorian Halifax*, *supra* note 146 at 130.

<sup>648</sup> However, as I will discuss in the next chapter, as early as 1921, the Commission on Mothers’ Allowances in Nova Scotia, on which Ernest Blois sat, recognized that there were potentially dangers to institutionalization and recognized the value of providing mothers’ allowances to “fit” widows and wives of disabled men, in order to keep their children at home. Furthermore, as Lafferty has pointed out “the redundancy of institutional care within the child welfare system appears to have been in its embryonic stages in the early 1920s. Through their own participation in and emphasis upon foster placement and adoption, the institutions themselves were encouraging their own superfluity.” See Lafferty, *supra* note 436 at 127.

mindfulness”<sup>649</sup> or “recapitulation theory”,<sup>650</sup> these specious scientific theories were legitimized by the force of law.

The role of law in this strategy of power was not only to silence the fact of racialized power relations but to bring the way that this power was exercised into line with a more scientific and objective methodology. As Angus McLaren has explained in his study of eugenics in Canada,

World War One offered doctors a golden opportunity to show the variety of ways in which they could make themselves useful to government in providing a health, disciplined military; they came out of the experience confident that in the future they would enjoy positions of leadership in civilian society.<sup>651</sup>

Doctors offered government scientific categories such as feeble-mindedness, behavioral disorders, social Darwinist ideas such as recapitulation theory, and developmental abnormalities to explain the causes of social inequality. Doctors also offered the appropriate medicalized treatment for this inequality.<sup>652</sup> Unlike other

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<sup>649</sup> Suzanne Morton, “Nova Scotia and Its Unmarried Mothers”, *supra* note 571 at 328 writes:

While the concept of illegitimacy may have originally referred to inheritance rights, by the twentieth century it carried a broad range of associations that included not only immorality or sexual impropriety but also feeble-mindedness and economic dependence upon the community.

<sup>650</sup> Lafferty argues for example, that juvenile court judges spoke in a “recapitulation” discourse. Lafferty, *supra* note 436 at 71-72:

In Nova Scotia recapitulation theory clearly marks the annual reports of both the provincial superintendent and the Juvenile Court judges in Halifax in the first decades of their existence. Both of these offices frequently mobilized the child-as-savage equation when exploring the conditions of (white) children within their jurisdictions and expressed persistent concern about the problems that would arise if the savagery of children brought before them remained unchecked. According to Judge WB Wallace, delinquents, truants, and children left to roam the streets of Halifax displayed a “want of self discipline” and weak moral fibre, as they “had never been taught the binding force of moral law...They are brought up like young savages and know no discipline.”

<sup>651</sup> McLaren, *Our Own Master Race*, *supra* note 439 at 29.

<sup>652</sup> Eugenics, for example, became an acceptable theory for explaining social inequality in some quarters in Nova Scotia at the time. For example, McLaren writes that in Nova Scotia alone, a League for the Care and Protection of Feeble-minded Persons developed as early as 1908 and had fifty local branches by 1912. The league was known as Canada’s first “eugenical movement”. *Ibid* at 24 and 41.

jurisdictions in North America, the institution continued to be an important part of the child protection regime in Nova Scotia up until the middle of the 20<sup>th</sup> century. The medicalized knowledge of the human sciences in the institutions lent legitimacy and objective truthfulness to judicial proclamations of harm and best interests.

In this way, the era of juvenile justice reflects Golder and Fitzpatrick's theory of the constitutive relationship between law and the disciplinary complex.<sup>653</sup> Disciplinary power relied upon the force of law to ground its claim to truth, and it relied upon the law to coerce the recalcitrant subject. In turn, this disciplinary power served to position the juvenile court as a specialist court with specialist knowledge on child development and reform. And it served to render "objective" highly moralized judicial decision making. Therefore, law and psychiatry were working in constitutive engagement, performing an essentially political role – they were working together to set out the terms of the proper citizen and ways and means by which this citizen would emerge. The doctors and psychiatrists attached to the juvenile court or working in the institutions acted in concert with the juvenile delinquent regime as "technician[s] of social order."<sup>654</sup> The proper citizen was an able-bodied, white, middle-class boy or girl acting out appropriate gender roles in a sexually appropriate manner. The children that did not fit within this model were labelled abnormal and the medical, as well as denominational, regime would work upon the child to attempt to normalize them.

The implications of course, of a willful ignorance of the effect of race, while legitimizing racist constructions of children and parents, as the survivors of the Nova

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<sup>653</sup> Golder and Fitzpatrick, *Foucault's Law*, *supra* note 109.

<sup>654</sup> See Rose, *supra* note 85 at 6.

Scotia Home for Colored Children<sup>655</sup> and Indian Residential Schools<sup>656</sup> are now teaching us, was the paradoxical overrepresentation of racialized children in child caring institutions at the time, while at the same time, hiding them from view. The failure of the Court – either the juvenile court or the Supreme Court – to scrutinize the activity of the institutions allowed for ostensibly scientific work with children that nevertheless served to reproduce ideas about white racial superiority and ensure racialized children were provided constrained expectations and opportunities fitting of their racial “evolution”. Furthermore, a lack of accountability of staff and the under-resourced nature of institutions for racialized children further amplified the marginalizing, oppressive and ultimately abusive effects of unfettered state control of these children.

Racist and gendered constructions of aboriginal families and children, African Nova-Scotian families and children, and mother-headed families in particular, served to construct intervention into these families as presumptively in the best interests of children. Therefore, not only did a focus on the individual transgressions of juvenile offenders serve to focus away from family autonomy, but the construction of families as themselves presumptively incompetent served to render moot any need to articulate and address at law the autonomy of this family.

Furthermore, when we compare the jurisprudence that issued from the Supreme Court at the time, with that of the juvenile court we can see a lack of access to justice to the superior courts kept the concerns of families in poverty to lower courts without the individual liberty protections found in the Superior Courts pursuant to the *Liberty of the Subject Act*. Despite this lack of access to justice, however, we still see a jurisprudence of

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<sup>655</sup> See for example, Eva Hoare, “The Silence is Deafening: Former Residents Who Claim They Were Abused Urge African-N.S. Affairs Minister to Add Voice to Call for Inquiry” *Chronicle Herald*, November 8, 2012, online: <http://thechronicleherald.ca/metro/165768-the-silence-is-deafening>.

<sup>656</sup> Truth and Reconciliation Commission, *supra* note 572.

individual rights issuing from the courts at the time. This indicates that parents in poverty did not just accept the institutionalization of their children, but used the law the advocate for their rights. This activity of marginalized families using legal means is consistent with recent findings of the Truth and Reconciliation Commission. In 1934 the Shubenacadie Indian Residential School principal had nineteen students flogged following a theft at the school.<sup>657</sup> As a result of parental complaints a judicial inquiry was called into the principal's actions. As Chris Benjamin found in researching his book, *Indian School Road*, many families brought complaints against the residential school system but they rarely found a sympathetic ear. With respect to the 1934 judicial inquiry he writes:

The 1934 public inquiry into abusive punishments presided over by Judge Audette (who sympathized with white people who didn't want to live near Indians) in which the staff members of the school were exonerated, resulted in jubilant media coverage that sometimes mocked the children's complaints. The Halifax Herald depicted the boys who testified to having been severely physically abused by the principal as disgruntled whiners lacking ethics and sincerity.<sup>658</sup>

The legacy of the institutionalization of the disabled in Nova Scotia and the coercive and denigrating treatment that they have received and the images with which they were depicted continue with us today.<sup>659</sup> In general, the trauma of marginalized families having to relinquish their children and possibly never seeing them again is incalculable. While socializing justice was critical of classical liberal legalism's insistence on a strict divide between the public and the private, its failure to recognize and affirm the liberty of children and their families would likewise have devastating effects. And yet the critique that

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<sup>657</sup> Truth and Reconciliation Commission of Canada, *They Came for the Children: Canada, Aboriginal Peoples and Residential Schools* (Winnipeg: Truth and Reconciliation Commission, 2012) at 38-39.

<sup>658</sup> Benjamin, *Indian School Road*, *supra* note 567 at 126-127.

<sup>659</sup> See for example, Michael Tutton, "Mothers Urge Probe After Death at Lower Sackville Rehab Centre," *Chronicle Herald* (26 May 2014), online: Chronicle Herald <<http://thechronicleherald.ca/metro/1210188-mothers-urge-probe-after-death-at-lower-sackville-rehab-centre>>



socializing justice posed of liberal legalism was apt – a liberal rights regime alone was capable of doing little in terms of providing substantive support for families in poverty. However, it would not be until the 1960s when there would be a realization that justice would require greater economic support of these families in the form of social assistance.<sup>660</sup>

Although we see the Supreme Court limiting the scope of intervention of the juvenile delinquent regime, these limits were capable only of protecting individual rights to privacy and liberty. In this sense, the Court was protecting a sphere of privacy for individuals who could gain access to the Court, but it was not yet able to guarantee a sphere of family privacy or family autonomy. For instance, in *Mailman, supra*, the Court was able to point to how aspects of the due process rights of the child and parents individually were violated as a basis for ordering the return of the child. But what is missing in the decision is an actual articulation of the right of the family in poverty to remain together and to self-determine without unjustified outside intervention. Beginning in the 1950s the Supreme Court of Canada articulated a concept of natural parental rights which allowed the Courts to adjudicate upon a sphere of family autonomy that would be protected by the Courts *vis a vis* the child protection system. Families in poverty which had previously experienced a coercive regulation would have a sphere of privacy articulated and protected by the courts. The next chapter will discuss the potentials and limitations for marginalized families of this jurisprudence of natural parental rights.

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<sup>660</sup> Even so, the 1960s would see the dismantling of Africville and the “60s scoop” where children on aboriginal reserves were removed *en masse*. Equal rights for aboriginal and African Nova Scotians would only begin to be discussed in the mainstream with the introduction of the Charter in the 1980s. Marlee Kline, “Child Welfare Law, ‘Best Interests of the Child’ Ideology, and First Nations” 30 (1992) Osgoode Hall LJ 375 at 376.

## Chapter 4:

### 1940s- 1980s: Deinstitutionalization, Natural Parental Rights and the Rise of the “Unmarried Mother-Headed family” as a Legitimate Family

Bowen L.J. in *In re Agar-Ellis; Agar-Ellis v. Lascelles* [(1883), 24 Ch. D. 317 at 337-8.], quoted in the *Re Baby Duffell* at p. 747:

. . . it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can.

By the 1940s and 50s, experts in the field of child psychiatry, such as John Bowlby<sup>661</sup> and Anna Freud,<sup>662</sup> were producing internationally-renowned studies on the importance of maternal attachment and the harmful effects of institutionalization. In Nova Scotia, members of the child welfare regime were increasingly calling for the use of the city’s institutions as temporary receiving centers only – as a stopping point between biological families and foster or adoptive families. The heyday of the institution in Nova Scotia was over, but not the influence of psychiatry on the field of child welfare. The field of social work was becoming more professionalized in the province, with the Maritime School of Social Work opening in 1940 and the establishment of the Nova Scotia branch of the Canadian Association of Social Workers in 1942.

Psychiatry and child development knowledge were becoming integral aspects of casework with families and children. The received wisdom from child development experts and de-institutionalists was that children belonged at home.<sup>663</sup> Child welfare and social work personnel were increasingly calling upon government to provide more assistance to

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<sup>661</sup> John Bowlby, *Maternal Care and Mental Health* (Geneva: World Health Organization, 1952).

<sup>662</sup> Anna Freud, *Research at the Hampstead Child-Therapy Clinic: And Other Paper, 1956-1965* (New York: International Universities Press, 1969).

<sup>663</sup> Bowlby; Freud, *ibid.*

worthy and deserving mothers in order to keep their children at home. Preventative casework in the form of counselling and material assistance, was carried out by social workers to help keep the family together and prevent the institutionalization of poor children.<sup>664</sup>

The provision of social assistance to certain mother-headed families from the 1930s to the 1950s, meant that some types of families no longer had to place their children voluntarily with the city's institutions because of poverty. Widows, and families whose breadwinners were unemployed due to disability or were killed or maimed in the war were now provided for by social assistance and did not have to rely on the institutions or the charitable apparatus.<sup>665</sup> The provision of social assistance to these families marked the beginning of public support for the autonomy of mother-headed families. But mothers' allowances were not provided as of right. They were only provided to certain types of families, and even then, on certain conditions, ie., that the mothers who applied were "fit" to look after their children.

It is in this era we see the Children's Aid Society really take center stage in child welfare work in Nova Scotia. The Children's Aid Society (the "CAS") was uniquely placed to fill the role that the institutions once did, with its expertise in casework, home visiting and child placement. The provision of social assistance to "fit" and "proper" families likewise required casework and visiting expertise. Determining which families were worthy and ensuring their continued fitness helped to quell fears that unfit families were squandering allowances provided from the hard-earned money of taxpayers and producing unfit, or abnormal children. De-institutionalization and the proliferation of a

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<sup>664</sup> Jacobson, *A Better Deal for Children*, *supra* note 495.

<sup>665</sup> *Mothers' Allowances Act*, RSNS 1954, s 182, s 4.

professionalizing cadre of social workers were essential to the emergence of the modern welfare state in Nova Scotia.

Furthermore, newly professionalized children's aid workers, armed with knowledge of child development, could now be deployed into society, into the homes of children, allowing the child welfare regime to assess the child in the family milieu. While the Victorian child and juvenile delinquent were variously constructed as innocent or a potential criminal, the post-war image of the child was increasingly depicted in psychological terms. The child of the post-war era was the psychological child; a blank moral slate that was rather the psychological product of his environment.<sup>666</sup> Child development knowledge was establishing that children needed to make health, "normal" attachments in the home.<sup>667</sup> While the caseloads of children's aid society workers increased in the 1950s and especially into the 1960s, there were relatively few children that were actually taken into care.<sup>668</sup> The CAS saw its role within the child welfare regime increasingly as working with families in the home to help keep the family together and to ensure a proper psychological environment for the child.<sup>669</sup>

Very little administrative and legal infrastructure was needed, then, to ensure that the children of the poor still had regular contact with the child welfare regime. Social workers could continue to compile statistics on these children and their families. Through visiting and counselling work, they could impart child development advice and their knowledge of child psychology to families. The field of psychiatry and the mental hygiene

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<sup>666</sup> In 1944, for example, child psychiatrist, John Bowlby published his study on 44 Juvenile Thieves, asserting that the reason for juvenile delinquency was early separation from the mother. See John Bowlby, *Forty-Four Juvenile Thieves* (London: Balliere, Tindall and Cox, 1946).

<sup>667</sup> Bowlby, *Maternal Care and Mental Health*, *supra* note 661.

<sup>668</sup> Jacobson, *A Better Deal for Children*, *supra* note 495 at 41.

<sup>669</sup> *Ibid.*

movement were developing knowledge about the family as a nexus of relationships which either produced the well-adjusted or neurotic child.<sup>670</sup> The family itself became an important psychiatric subject. The newly professionalizing field of social work assisted in moving this psychiatric knowledge from the institutions into the sphere of the family.

But one family form was still presumed to be both unfit for the purposes of assuring a proper psychological environment for the child and undeserving of public support: the unwed-mother-headed family. Child development theories saw unwed mothers as unable to provide for healthy, normal child development. Furthermore, unwed mothers who had conceived their children out of wedlock were presumptively deemed unfit and did not become eligible for social assistance 1966. Until this time, they continued to be provided for under by municipal settlements, as per the *Poor Law*.<sup>671</sup> The policy of the CAS in the post-war years and into the 1960s, was to provide unwed mothers with “services” so that they could make a “plan” for the child. In many cases this would entail adoption or the making of wardship orders for un-relinquished children.<sup>672</sup>

New knowledge about, and a renewed respect for, the family was also reflected in child welfare jurisprudence. In the 1950s the a jurisprudence of “natural parental rights” issued from the Supreme Court of Canada, articulating the presumptive right of the natural parent to the custody and care of the child.<sup>673</sup> This articulation by the courts of a concept of natural parental rights, in concert with the provision of social assistance for mother-

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<sup>670</sup> Mona Gleason, “Growing up to be ‘Normal’: Psychology Constructs Proper Gender Roles in Post-World War II Canada, 1945-1960,” in in Lori Chambers and Edgar-Andre Montigny, eds, *Family Matters: Papers in Post-Confederation Canadian Family History* (Toronto: Canadian Scholar’s Press Inc, 1998) at 39.

<sup>671</sup> Janet Guildford, “The End of the Poor Law: Public Welfare Reform in Nova Scotia before the Canada Assistance Plan,” in Judith Fingard and Janet Guildford eds, *Mothers of the Municipality: Women, Work and Social Policy in Post-1945 Halifax* (Toronto: University of Toronto Press, 2005).

<sup>672</sup> Jacobson, *A Better Deal for Children*, *supra* note 495 at 41.

<sup>673</sup> *Martin v Duffell*, [1950] SCR 737, 4 DLR 1; *Hepton v Maat*, [1957] SCR 606; and *Agar v McNeilly*, [1958] SCR 52.

headed families and the families of disabled men, marked a concerted support for the autonomy of marginalized families. But as I will argue, the concept of natural parental rights was also progressive in that it challenged the hostility towards unwed mother-headed families from social services quarters at the time that saw unwed mothers as presumptively undeserving of support and assistance. The jurisprudence of natural parental rights was important not only for protecting a sphere of liberty around the unwed-mother-headed family, but it served to construct the unwed-mother-headed family as a legitimate family, and unwed mothers as capable of providing care for the child, sufficient to obviate the need for state intervention. Rather than presuming that state care was required for the children of unwed mothers, the Courts affirmed that there had to be a testing of the need for state intervention.

The protection of a sphere of privacy for these unwed-mother-headed families despite their construction as psychologically unfit and undeserving evidences a progressive use of a presumption of family autonomy against the disempowering constructions of unwed mothers from social policy and the child caring professions. In this chapter I will investigate how the concept of natural parental rights developed and ultimately, what promises it held for empowering unwed mother-headed families and other marginalized families. In the end, however, I argue that while the jurisprudence of natural parental rights was at points progressive, it also proved to be vulnerable to negative value judgments about mothers and families in poverty. This era of child protection jurisprudence serves as an important study of the limits and potentials of a legal presumption of family autonomy for marginalized families.

## The Creation of Nova Scotia's Provincial Public Assistance Regime

The child welfare regime was an integral factor in the emergence of social assistance in Canada. The very rationale behind social assistance in the early years was to safeguard the welfare of children in the home, particularly those of “deserving” widows.<sup>674</sup> Provincial mothers’ allowance legislation was enacted across Canada in the years following the First World War as the devastation and loss of human life in that war gave rise to a sharp spike in female-headed households.<sup>675</sup> The first province to pass a Mothers’ Allowances Act was Manitoba (1916), swiftly followed by Saskatchewan (1917), Alberta (1919), British Columbia (1920) and finally, Ontario later that same year. The mothers’ allowances were administered in Saskatchewan, Alberta and British Columbia by the Superintendent of Neglected and Delinquent Children in each province. In these provinces the Superintendent and his office was not only charged with overseeing the child welfare regime, but in deciding applications for assistance.

By 1919, in Nova Scotia, the *Poor Law* was still in place and the only provision for social security in the province was municipally-provided Halifax Relief pensions, or provincially administered worker’s compensation schemes for workers disabled or killed in industrial accidents.<sup>676</sup> Provision of social assistance was, however, on the radar of the provincial government at this time, partly due to the social problems caused by the First World War and the Halifax Explosion, but also because these allowances had been in place

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<sup>674</sup> See Little, *No Car, No Radio*, *supra* note 63.

<sup>675</sup> *Ibid*; Dennis Guest, *The Emergence of Social Security in Canada*, *supra* note 207. Most acts also provided not only for widows but for women whose husbands were in the insane asylum. While combat PTSD is assumed to be a relatively recent mainstream concern, it is possible that the provision of assistance to the families of men in asylums is indicative that in fact, after WWI this was a prevailing, although possibly stigmatized, social issue.

<sup>676</sup> *Ibid* at 71-72.

for several years in other provinces in Canada. In 1919, a provincial Commission on Mothers' Allowances was convened in order to research and make recommendations on the creation of such a scheme in Nova Scotia.<sup>677</sup>

The Commission was composed of a group of four Commissioners, including Ernest Blois, then Superintendent of Neglected and Delinquent Children, and Jane Wisdom, the first professional social worker in Nova Scotia who headed the Bureau of Social Services in Halifax from 1916 to 1921.<sup>678</sup> The Commission ultimately recommended the adoption of a Mothers' Allowance for Nova Scotia, recognizing the following child-centered rationale for the program:

[S]ociety today is necessarily engaged in repairing evils in the social structure, sadly necessary because of poor foundation work, emphasizing the old adage that "an ounce of prevention is better than a pound of cure." The trend of modern thought, as a result in social reform, is turning more to the home, the unit of the social fabric. Mothers' allowance schemes, which have now passed the experimental state, are outstanding evidence of this, and may easily be classed as advanced constructive legislation.<sup>679</sup>

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Your Commission cannot too strongly emphasize the cardinal principle underlying our recommendations, namely; that the object is to provide worthy mothers, who would be otherwise unable to do so, with the means of keeping their young children under their immediate care. It is indisputable that it is in the best interest of both the children and the state that they remain in their mothers' care. The scheme must not be confounded with compensation or pension for widows. We would also emphasize the fact that the administration of such allowances differs materially from ordinary pensions or compensation.<sup>680</sup>

The final report of the Commission recommended against a *Poor Law*-type scheme based on municipal settlements. The rationale was that such a scheme "would be difficult of

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<sup>677</sup> *Report of Commission on Mothers' Allowances* (Halifax: Commissioner of Public Works and Mines, 1921); SNS 1919, c 26.

<sup>678</sup> Nova Scotia Association of Social Workers "Pioneers," online: NSASW <<http://www.nsasw.org/inner.php?id=110>>.

<sup>679</sup> *Report of Commission on Mothers' Allowances*, *supra* note 677 at 4.

<sup>680</sup> *Ibid* at 16-17.



administration, and in many cases would bring unjust burdens upon comparatively small and weak districts and municipalities. On the other hand to create a new basis of settlements or qualification would, we think, lead to endless dispute and contention.”<sup>681</sup>

The Commission recommended instead a province-wide scheme of social assistance:

After giving this matter matured consideration, we are convinced that the scheme should be province wide, and that the expense should be a direct tax on the whole province and not borne according to the number of cases of any particular locality. We believe that the great majority of our people would favor such a scheme.<sup>682</sup>

The Commission did not recommend, however, the universal provision of Mothers’ Allowance to all families, or even to all mother-headed families. Instead, the Commission adopted a typology of families, familiar from the other jurisdictions in Canada, which divided mother-headed families into five groups, by order of deservedness of support:

1. Widows. (a) Two or more children. (b) One child.
2. The wife of a man who is totally disabled.
3. The wife of a man who is the inmate of an insane asylum or under sentence in a penitentiary.
4. The wife of a man who has deserted his family.
5. Unmarried mothers.

The Commission provided the following explanation of their typology:

After careful research and inquiry, we feel convinced that the five groups...stand in order which the great bulk of public opinion would favor for support from public funds. We realize that for each of the several groups strong claims could be made for individual cases and your Commission had first thought a scheme might be devised whereby the really worthy in each of these classes might be assisted, but more careful and mature consideration convinced us that it was a wiser policy to begin with the really deserving of the first group, viz. widows with two or more dependent children, and after the necessary machinery was put in operation for carrying out such a scheme and the results were apparent to our people, that it would then be comparatively easy to include the most worthy of the other groups.

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<sup>681</sup> *Ibid* at 6.

<sup>682</sup> *Ibid*.

In our enquiries of public officials and many private persons, we never met with the slightest objection to the granting of an allowance to the needy and worthy woman, left alone with the responsibility of bringing up her young children. There was, however, a very decided opinion expressed, that the success of any such scheme would wholly depend upon the care and good judgment of the administering body. It was the universal opinion, and we found the same thought strongly emphasized in all the reports we read – that too careful provision cannot be made for determining who is to receive allowances and the conditions under which such allowances should be enjoyed.<sup>683</sup>

The Commission recommended that widows with two or more children should immediately receive an allowance and only after this group should consideration be given to the other groups. Essential to the administration of the Act was discretion, visiting and investigation in order to determine eligibility or fitness to receive support. While “pensions” were paid simply on the basis of one’s qualifying according to eligibility criteria, “allowances” were to be administered on a discretionary basis. The Commission noted that there would be reason to provide Mothers’ Allowances to groups 1 through 4, but these should only be dispensed if the mother proved herself to be a fit and proper mother, as determined after visiting and investigation. With regard to the position of unmarried mothers, however, the Commission was not convinced that this group would ever be eligible for public funds:

We are of the opinion that no public funds should be spent for the maintenance of children of unmarried mothers, without first changing the present law with regard to parental responsibility for such children. We are strongly of the opinion that the present act should be repealed and a new act substituted therefore, making it the duty of the Province to initiate proceedings to establish the paternity of every child and to fix the responsibility of financial support. We are doubtful, if it would ever be wise to pay as a class of mothers of illegitimate children from public funds. Certainly there is little public sympathy for such a proposal at this time. Yet there are undoubtedly rare cases when it would be in the interest of the particular child and mother if they could participate in such a scheme. Provision might be made at some future time to consider such cases on their individual merits.<sup>684</sup>

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<sup>683</sup> *Ibid* at 5.

<sup>684</sup> *Ibid* at 13-14.

Therefore, although allowances were being provided on the basis that it was in the best interests of children to be kept at home, when it came to making provision for the children of unmarried mothers, other, more conservative, moralistic considerations prevailed. Unmarried mothers were presumptively under suspicion – not only did these women have sex outside of marriage, but they chose to keep their children as opposed to putting them up for adoption. As Shelley Gavigan and Dorothy Chunn have pointed out, there was a hypocritical position taken by the Commission with respect to the appropriateness of mothers earning a wage. While the maternal instincts and abilities of middle class mothers were valorized, low-income mothers were criticized if they did not engage in at least some sort of paid work to keep themselves or their children from becoming a charge on the state. The fact of a single mother engaging in paid labour was then taken as a sign of a lack of maternal instinct, naturalizing a connection between privileged domesticity and maternal instinct. As Chunn and Gavigan explain:

In Nova Scotia, for example, there was ‘a general prejudice against wage-earning mothers’; the Reports of the Commission on Mothers’ Allowances adopted a contradictory position: they stated that engaging in wage labour and taking in boarders was ‘inappropriate’ for mothers, but ‘accepted the belief that a mother should be able to support at least one child.’ Joan Sangster has also identified the social stigma as well as the economic marginalization suffered by single mothers, even widows. If women on mothers’ allowance took in supplementary wage work, ‘they were criticized for “taking jobs away from others”’ and ‘criticized by other citizens, including women, for taking state money rather than working!’<sup>685</sup>

While visiting and investigation would be essential to determine whether members of groups 1 to 4 from the Commission’s classification scheme should receive an allowance, special scrutiny for the request of the unmarried mother for support. As Suzanne Morton explains:

There was a willingness to support certain single mothers [ie., groups 1 to 4], albeit in a parsimonious and often highly intrusive manner, but these indigent women

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<sup>685</sup> Shelley AM Gavigan and Dorothy E Chunn, “Women, the State and Welfare Law: The Canadian Experience” in Shelley AM Gavigan and Dorothy E Chunn, eds, *Legal Tender of Gender*, *supra* note 41 at 60.

were not considered responsible or accountable for their own lack of a husband and male breadwinner. Indecent sexual conduct or perhaps, more accurately, the ill fortune of becoming pregnant and not marrying the father made other needy women ineligible.<sup>686</sup>

The Commission's final report would prove to be quite influential. Their typology of mother-headed households would remain in Nova Scotia's social assistance legislation until the mid-1960s. The first scheme of mother's allowance that was passed in Nova Scotia – and indeed, the first piece of social assistance legislation in the province – provided for allowances to widows and to the wives of disabled men. The *Mothers' Allowances Act* established an Advisory Commission which was in charge of inquiring into, and deploying visitors and investigations to assess the merits of, an application by a mother.<sup>687</sup> The Act provided that a widow, and the wife a man “who by reason of permanent (physical or mental) disability is unable to support his family”<sup>688</sup> could apply for allowances “not exceeding eighty dollars a month”.<sup>689</sup> Female kin guardians such as grandmothers, sisters, aunts or other “suitable persons” were eligible to apply for allowances for the care of orphans.<sup>690</sup> Mothers and guardians were not entitled to appeal the decisions of the Director of Mothers' Allowances,<sup>691</sup> thereby removing the provision of welfare from oversight

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<sup>686</sup> Morton, “Nova Scotia and Its Unmarried Mothers”, *supra* note 571 at 331.

<sup>687</sup> Section 3(1).

<sup>688</sup> These families, however, were not provided for until the Mothers' Allowances regulation in 1943 expanded the definition of “widow”: see SNS 1943, c 26.

<sup>689</sup> Section 4(1).

<sup>690</sup> Section 4(1)(b).

<sup>691</sup> Section 7.

Unmarried mothers would not be entitled to social assistance until 1966.<sup>692</sup> Furthermore, the original *Mothers' Allowances Act* explicitly deemed ineligible First Nations and immigrant women. The ineligibility of these women and unwed mother-headed households meant that until the passage of the *Social Assistance Act* in 1966, these families were still subject to the *Poor Law*. Statistics from the 1930s in Halifax, for example, reveal pregnant women resident in the Halifax Poor House into that decade.<sup>693</sup> Unmarried mothers could also turn to the charitable institutions in Halifax, including the Halifax Infants Home and the Home of the Guardian Angel. In effect, then, from the 1930s until the mid-1960s there was a two-tier system of assistance provided to mother-headed households: the “worthy” would receive provincially supported and administered allowances, while the “unworthy” were subject to the *Poor Law*.

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<sup>692</sup> See *Social Assistance Act*, RSNS 1967, c 284.

<sup>693</sup> Morton, “Nova Scotia and Its Unmarried Mothers”, *supra* note 571 at 335; furthermore, in her article on the history of welfare reform before the passing of the Canada Assistance Plan, Janet Guildford provided the following illustration of the application of the *Poor Law* to persons ineligible for provincial social assistance:

Until the 1960s, then, needy families were inadequately supplied with income assistance, and had to rely too often on the Poor Law institutions, the county or municipal homes. Throughout the province, these poorhouses were an important and troubling aspect of welfares provision. Most of these institutions dated back to the late nineteenth century, and a significant majority of them also served as chronic care mental hospitals. In the 1940s and 50s, most municipal homes accommodated a miscellaneous population of ‘sane paupers’ and the ‘harmless insane.’ Little segregation was effected, and the homes served a mixed population of patients who were mentally challenged or chronically ill, as well as unmarried mothers, prostitutes, juvenile delinquents and the elderly poor. No provincial financial assistance was available to the municipalities to help with the costs of these institutions and so, in poorer counties, the buildings had been allowed to deteriorate dreadfully.

Conditions in many of the homes were appalling, and they became a favourite target of reformers. There were a number of detailed studies of poorhouses in the 1940s and 1950s. The first was completed in 1944 by George Davidson as part of the Dawson Commission Report. After visiting nine of the municipal homes in the province, he wrote: ‘In general the institutions present a depressing appearance on the inside...are poorly and inadequately staffed both as to numbers and as to quality of personnel, and serve, on the whole, as little more than indiscriminate dumping grounds for all the various types of unfortunate misfits who happen to be a burden on the community.’ [citations omitted]

See Guildford, “The End of the Poor Law”, *supra* note 671 at 55.

This two-tier system of welfare was consonant with the second-class status to which the children of unmarried mothers were generally subject at the time. The common law family required a paternal head (who could support the family financially) married to the mother in order to be recognized as a legal family and accorded the privacy and autonomy accorded to the legitimate family. The unmarried mother-headed family did not exist as a legitimate family with full rights to privacy and autonomy. The children of unmarried mothers were referred to as bastards or illegitimate children and were under severe legal disabilities, including the inability to inherit property. In the 19<sup>th</sup> century, especially in agricultural economies such as Nova Scotia's, this inability would have adverse financial consequences. Pursuant to *Maintenance of Bastards Act* and then *Illegitimate Children's Act*, any ratepayer in a poor district in which a woman had settlement could bring a public action to have the mother brought before the court and attest to the identity of the putative father. As Suzanne Morton has described, these could often be humiliating experiences, such as one case in Lunenburg county which was later described as having "tore every shred of self-respect' from a woman who had had a child out of wedlock, publicly labelling her promiscuous and immoral."<sup>694</sup>

It was not until 1951 with the passing of the *Children of Unmarried Parents Act*<sup>695</sup> that the "civil liability of fathers," to provide for the "medical and other expenses connected with the birth of the child, its maintenance and education,"<sup>696</sup> was enforced for illegitimate children. The Act empowered unmarried mothers to bring applications to claim maintenance and to have this maintenance paid directly to them as opposed to the

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<sup>694</sup> Morton, "Nova Scotia and Its Unmarried Mothers" *ibid* at 332.

<sup>695</sup> RSNS 1954, c 31.

<sup>696</sup> *Ibid*, s 27(1).

overseers of the poor.<sup>697</sup> Where the child and mother were the responsibility of the overseers of the poor or the Department of Public Welfare, however, the filiation proceedings remained under public control. Nevertheless, the legislation did help to legitimize the unmarried mother-headed family in part by giving her a right to apply for maintenance from the father directly, without having to first apply for settlement under the *Poor Law*.

Unmarried mothers and their children were not, however, accorded rights to publicly provided social assistance. By default, therefore, where they could not sustain themselves with the mother's work, the father's maintenance, or help from family, they were still subject to the *Poor Law* for another 15 years. Unmarried mothers would only become eligible to receive social assistance in 1966, and then only when federal money was made available to the province through the Canada Assistance Plan.<sup>698</sup> Until this time, responsibility for the poverty of unmarried mother-headed families was not seen as a rightful public concern, but rather, a private problem to be handled by enforcing child maintenance, and failing that, by appeal to the municipal *Poor Law* system. Furthermore, social assistance would not be extended to the wives of men who had deserted the family until 1956. The message to these families was clear: the poverty of unwed and deserted mothers was their own personal responsibility and would not be addressed through public support.

This discretionary and moralizing rationale behind mothers' allowances, however, was not necessarily the same rationale as lay behind the provision of other types of social assistance at the time. With such heavy state involvement in the economy during the wars,

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<sup>697</sup> *Ibid*, s 32.

<sup>698</sup> Fitzner, *supra* note 138 at 61; Department of Public Welfare, *Welfare Services in Nova Scotia* (Halifax: Department of Public Welfare, 1965); Senior Scribes, *supra* note 266 at 27-28.

and especially World War II, state assistance was thought of not just in terms of emergency relief, but as “a vital element of the smooth functioning of the wartime economy”.<sup>699</sup> During the war the federal government had created the Dependents’ Allowances program for families of those in the armed forces, built homes for servicemen, paid the costs of daycare so women could move into the labour force and fill the vacuum left by men overseas.<sup>700</sup> By the early 1940s, the federal government was dedicated to devising a social security plan that would aid in the post-war reconstruction. The year 1940 saw the introduction of Unemployment Insurance, which was the largest social security program Canada had yet implemented, covering 75% of all wage-earners.<sup>701</sup> In 1944, the Federal government instituted the *Family Allowances Act* which provided a benefit for each child under the age of 16.<sup>702</sup> The aim of the allowance was to provide for minimum requirements for all children such as clothing and food.<sup>703</sup> The program was the first universal assistance program instituted in Canada. Benefits were provided to all Canadian born children regardless of any other eligibility criteria. The post-war era also saw the introduction of universal Old Age Pensions and the administration of a system of national health grants from the federal government to the provinces.<sup>704</sup> Therefore, while the welfare state was expanding, especially into the postwar years, indicating an acceptance of the need to socialize the inherent risks of the economy, mothers’ allowances remained heavily moralized scheme of assistance.

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<sup>699</sup> Guest, *The Emergence of Social Security*, *supra* note 207 at 105.

<sup>700</sup> *Ibid.*

<sup>701</sup> *Ibid.*

<sup>702</sup> Little, *No Car, No Radio*, *supra* note 68 at 109.

<sup>703</sup> Guest, *The Emergence of Social Security*, *supra* note 207 at 129.

<sup>704</sup> *Ibid.*



The later war years also saw the bureaucratization and centralization of public assistance in Nova Scotia. In 1944, the Department of Public Welfare was established and was assigned all provincial social welfare matters.<sup>705</sup> Ernest Blois, who had been appointed the Director of Mothers' Allowance since 1930 and then the Director of Old Age Pensions in 1933, was appointed the first Deputy Minister of the Department. On December 1, 1944, H.S. Farquhar was appointed Director of Old Age Assistance and Fred MacKinnon would become the Director of Child Welfare and Mothers' Allowance.<sup>706</sup> MacKinnon is seen as a pioneer of the modern system of welfare in Nova Scotia and would serve the province for 55 years as a public servant until his eventual retirement as deputy minister in 1995. He is generally seen as a strong advocate, largely responsible for the centralization of public assistance in Nova Scotia, including both social and child welfare assistance in the province.<sup>707</sup>

The Canadian welfare state continued to grow in the post-war years. In 1956, the federal government passed the *Unemployment Assistance Act* which provided that agreements could be entered into between the federal government and the provinces whereby the provinces would be reimbursed for half their expenditures on assistance to the unemployed. It is noteworthy that payments for Mothers' Allowances were not covered under this cost sharing arrangement, thus creating a two-tier structure of welfare in the provinces that accepted the agreement.<sup>708</sup>

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<sup>705</sup> Department of Public Welfare, *supra* note 698 at 29.

<sup>706</sup> *Ibid* at 30.

<sup>707</sup> Nova Scotia Association of Social Workers, *supra* note 678.

<sup>708</sup> Senior Scribes, *supra* note 135 at 28.

Two years later in 1958, Nova Scotia passed the *Social Assistance Act*<sup>709</sup> which provided not just for cost sharing between the provinces and the federal governments, but for contributions from municipal levels of government, as well. The passage of the *Social Assistance Act* saw the rescission of the *Poor Law* and the introduction of a modern system of social assistance including the provision of assistance to deserted wives. Expenditures on assistance grew from \$500,000 in 1956 to \$1.5 million in 1964.<sup>710</sup> In 1964, the Department of Public Welfare was divided into six divisions: Old Age Assistance, Social Assistance, Child Welfare, Social Development, Field Services, and Office Services.<sup>711</sup> Despite the hailed elimination of the *Poor Law* in the 1958 *Social Assistance Act*, it would not be until 1966 that cost sharing for Mothers' Allowances would be introduced, with the passage of the Canada Assistance Plan (the "CAP"). The CAP allowed for the provision of assistance to unwed mothers finally to be taken out of the municipal social assistance provisions in the 1966 *Social Assistance Act*, finally bringing responsibility for these families under the auspices of the provincial government.<sup>712</sup>

Therefore, the post-war years in Canada saw the reconceptualization of the relationship between the individual, family and the state. The state was understood as having a greater responsibility for protecting the individual against the risks of the economy and a greater role in maintaining supports for the family. Unlike notions of privacy under *laissez-faire* capitalism, post-war notions of autonomy did not simply mean freedom from state intervention or the "freedom to be left alone."<sup>713</sup> A socialized notion of

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<sup>709</sup> RSNS 1967, c 284.

<sup>710</sup> Department of Public Welfare, *supra* note 698 at 32-33.

<sup>711</sup> *Ibid* at 33.

<sup>712</sup> Senior Scribes, *supra* note 135 at 28.

<sup>713</sup> See, for example, Louis D Brandeis and Samuel D Warren, "The Right to Privacy" (15 December 1890) 4.5 Harv LR 193; *Lochner v New York* (1905), 198 US 45.

autonomy for the citizenry emerged which saw the state as responsible for the risks borne by individuals and their families. Welfare experts of the time believed that the support of families was in the best interests of the citizenry and the country as a whole. While the juvenile delinquents regime was focussed on the individual child in a quasi-criminal justice system, the post-war era marked a renewed emphasis on families as serving the public interest.

Not all families, however, would be deemed to operate in the best interests of their children or the state. In the *Report of the Commission on Mothers' Allowance*, the Commission had recommended in 1921 that friendly visiting and investigation were necessary to assure taxpayers that assistance was going to good use and that those receiving assistance were "suitable" persons to have custody and care of their children.<sup>714</sup> Even then, certain mothers, by virtue of their marital status were deemed presumptively unfit.<sup>715</sup> This recommendation was instituted into law with the introduction of the *Mothers Allowance Act* in 1930 and continued to determine eligibility to mothers' allowances well into the post-war years.<sup>716</sup> In the next section I will discuss how newly professionalizing child welfare services, with their knowledge of child development and family casework became an importance means to determine the suitability of many mother-headed families.<sup>717</sup> Furthermore, these services assisted in bringing moralized determinations of deservedness in line with more objective determinations of "fitness".

The double-edged sword that was the mothers allowance has been described by historian Ann Vandepol in the following way:

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<sup>714</sup> *Report of Commission on Mothers' Allowances*, *supra* note 677 at 16-17.

<sup>715</sup> *Ibid.*

<sup>716</sup> *Mothers' Allowances Act*, RSN 1954, c 182, s 4(2)(b)(iii).

<sup>717</sup> James Struthers, "A Profession in Crisis: Charlotte Whitton and Canadian Social Work in the 1930s" LXII (1981) *Can Hist Rev* 169 at 169-171.

The mothers' pension program can hardly be described as an unqualified victory for working class families. Not all who deserved pensions received them, and for those who did, the price paid for this service was often outside scrutiny of family behavior. The program restored socialization and child-rearing functions to working-class parents, but indirectly authorized public officials and caseworkers to supervise how mothers carried out these tasks. Pensions had a dual and somewhat contradictory effect: they reconstituted the family and then cast a veil of surveillance over it. Nevertheless, in contrast to earlier methods of caring for dependent children, income support for widows did allow thousands of families to remain intact.<sup>718</sup>

Furthermore, as Gavigan and Chunn have argued, even when mothers' allowance eligibility was expanded in the 1950s, the way that this eligibility operated served to reinforce the idea that primary responsibility for the poverty of mothers was an individual one.<sup>719</sup> Mothers' Allowances were provided on a temporary, discretionary and therefore "residual" basis, reinforcing that at base, the family and individual – not the state – were responsible for the poverty of mother-headed families.<sup>720</sup>

As the next section will discuss, the post-war years in Halifax were also years of de-institutionalization and the return of child caring to the private sphere of the family. The denominational institutions faced increasing criticism of their ability to provide for the best interests of children, and they were no longer able to support themselves financially. The move to "familialize" the child-caring work of the poor in Halifax, through child welfare work and social assistance helped to address both of these problems. The Halifax Children's Aid Society, originally a child protection organization overshadowed by other philanthropic societies and the denominational institutions in Halifax in the early 20<sup>th</sup> century, became an integral part of the child welfare regime in Nova Scotia. The organization, with its professionalized "preventive" casework, friendly visiting and

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<sup>718</sup> Vandepol, "Dependent Children", *supra* note 252 at 232.

<sup>719</sup> Gavigan and Chunn, "Women, the State and Welfare Law", *supra* note 41 at 62.

<sup>720</sup> *Ibid.*

placement of children from indigent families, found itself at the intersection of de-institutionalization and the modernizing system of social assistance.

### **De-Institutionalization, Familialization, and the Changing Role of the Halifax Children's Aid Society**

Skepticism about the efficacy of institutions in providing for the best interests of children had arisen in Nova Scotia decades before the process of de-institutionalization in the post-war years. In fact, the *Final Report of the Commission on Mothers' Allowance* in 1921 quoted extensively from proceedings on the Mothers' Allowance in Ontario, where a member of the clergy spoke about the evils of institutional care:

My experience with institutional work is that it is one of the biggest mistakes that can possibly be to place any child in an institution, if it is possible to keep it out. I would go so far as to say that the best institution under the best management is not equal to the poorest home, provided that home be morally correct. If the surroundings of the home are good, if the environment is good, no matter about the poverty, I say, that home is better than the best managed institution I know of. So that we are all agreed, I think, those who are connected with institutional work that it is a sin, a crime, a hardship, an injustice to institutionalize any child, unless as a last remedy, where all things else fail. Under present conditions we are obliged to put children into institutions who really should not be there. If any such scheme of mothers' pension were in force, provision would be made for giving proper home training, and there is no question that these children would be much better citizens of the country.<sup>721</sup>

Consistent with a conservative maternalist ideology, it was believed that it was in the best interests of children to be raised by a "fit and proper" mother in their own home. Child welfare experts such as J.J. Kelso in Ontario had for some time been railing against the institutionalization of children.<sup>722</sup> Long term institutionalization, it was argued, would impair the proper development of the child and was an unfit environment for ensuring their proper socialization.

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<sup>721</sup> *Report of Commission on Mothers' Allowances*, *supra* note 677 at 7.

<sup>722</sup> See Jones and Rutman, *In the Children's Aid*, *supra* note 143.

This skepticism about institutionalization was also evident in 1924 when an investigative journalist for the *Halifax Citizen* published an exposé on abuse at the Industrial School, entitled, “Fiendish Cruelty Practised upon the Inmates of the Halifax Industrial School.”<sup>723</sup> The article detailed beatings, whippings and the case of one child who had gone insane and been sent to the Nova Scotia Hospital because of the abuse.<sup>724</sup> Several days after the story broke, then Superintendent Ernest Blois held a two-week long inquiry which heard further testimony of abuse, malnutrition and deplorable living and working conditions at the school.<sup>725</sup> The testimony from the hearing was publicized by the newspapers in Halifax, with such provocative headlines as “A Place of Torture – Not a Reformatory”.<sup>726</sup>

Yet, despite these revelations of horrible abuse and deplorable conditions the institutions remained an integral part of the child protection system in Nova Scotia. Indeed, the Nova Scotia Home for Colored Children was opened the same year that the Commission on Mothers’ Allowances was hailing the family home as the proper environment for the raising of children. It would still be several years until the Indian Residential School at Shubenacadie would open.

The outcome of Blois’s inquiry into the Industrial School was not its closure, but rather an insistence on its “modernization” and “professional direction” according to the modern principles of child development theories.<sup>727</sup> The insistence on maintaining, yet modernizing, the institutions sustained them as an important part of the City’s child

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<sup>723</sup> Lafferty, *The Guardianship of Best Interests*, *supra* note 436 at 3.

<sup>724</sup> *Ibid* at 4.

<sup>725</sup> *Ibid*.

<sup>726</sup> *Ibid*.

<sup>727</sup> *Ibid* at 145.

protection landscape into the 1950s. Lafferty reports that in 1945 there were just under 450 children in the city's institutions (excluding reformatories) but by 1956 there were only 200 inmates.<sup>728</sup>

The late-1940s and 50s was a time of increasing international concern over the institutionalization of children, particularly in medical and child psychiatry quarters.<sup>729</sup> Child psychiatrists such as Dr. John Bowlby and Anna Freud, were conducting and widely publishing the results of studies on the harmful effects of institutionalization on normal child development.<sup>730</sup> The pervasive dislocation of communities and separation of children from their parents during the world wars gave child development experts ample opportunity to investigate the effects of parental separation on child development and socialization. During the World War II, Anna Freud published several books on the effect of the war on children. Having fled Vienna to London in 1938, she worked at the Hampstead War Nurseries where she recorded her observations of the children left there by parents sent off to war, working for the war effort during the day, as well as orphaned children.<sup>731</sup> In her intense observations of these children she began to develop the beginnings of "attachment theory" still in use in child development discourse today. In particular, Freud was becoming keenly aware of the emotional impact on children of separation from their parents.<sup>732</sup>

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<sup>728</sup> *Ibid* at 195.

<sup>729</sup> Denise Riley, "War in the Nursery" (1979) 2 *Feminist Review* 82 at 93.

<sup>730</sup> *Ibid* at 182.

<sup>731</sup> Nick Midgely, "Anna Freud: The Hampstead War Nurseries and the Role of Direct Observation of Children for Psychoanalysis" (2007) 88.4 *Int J of Psych* 939 at 940.

<sup>732</sup> *Ibid* at 948.

After the war, Dr. John Bowlby continued to develop Freud's theories on the emotional consequences of separation and residential care, culminating in his theory of "maternal deprivation". In 1949, the World Health Organization commissioned Bowlby to undertake a study of children displaced by the war, that is, "orphaned or separated from their families for other reasons and need[ing] care in foster homes, institutions or other types of group care."<sup>733</sup> In the study, originally published in 1951, Bowlby explicated his theory of maternal deprivation:

[W]hat is believed to be essential for mental health is that the infant and young child should experience a warm, intimate, and continuous relationship with his mother (or permanent mother-substitute) in which both find satisfaction and enjoyment. Given this relationship, the emotions of anxiety and guilt, which in excess characterize mental ill-health, will develop in a moderate and organized way. When this happens, the child's characteristic and contradictory demands, on the one hand for unlimited love from his parents and on the other for revenge upon them when he feels that they do not love him enough, will likewise remain of moderate strength and become amenable to the control of his gradually developing personality. It is this complex, rich, and rewarding relationship with the mother in the early years, varied in countless ways by relations with the father and with siblings, that child psychiatrists and many others now believe to underlie the development of character of mental health.

A state of affairs in which the child does not have this relationship is termed 'maternal deprivation'. This is a general term covering a number of different situations. Thus a child is deprived even though living at home if his mother (or permanent mother-substitute) is unable to give him the loving care small children need. Again, a child is deprived if for any reason he is removed from his mother's care. This deprivation will be relatively mild if he is then looked after by someone whom he has already learned to know and trust, but may be considerable if the foster-mother, even though loving, is a stranger. All these arrangements, however, give the child some satisfaction and are therefore examples of partial deprivation. They stand in contrast to the almost complete deprivation which is still not uncommon in institutions, residential nurseries, and hospitals, where the child often has no person who cares for him in a personal way and with whom he may feel secure.<sup>734</sup>

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<sup>733</sup> Bowlby, *Maternal*, *supra* note 661 at 6.

<sup>734</sup> *Ibid* at 11-12.



Bowlby reported that while the partial deprivation could cause anxiety, feelings of revenge, guilt and depression, the consequences of complete deprivation were “far-reaching effects on character development and may entirely cripple the capacity to make relationships.”<sup>735</sup> Bowlby’s analysis was decisive: contrary to the original intentions of institutional care, such care was unable to produce the normal character development necessary for the production of the normal adult.

By the late 1940s and early 1950s, so pervasive was the critique of the institutionalization of children, that the institutions themselves advocated curtailing their services and serving only as temporary shelters for children waiting to be placed or children suffering emotional disturbances.<sup>736</sup> By this time, the institutions were experiencing acute financial difficulties. As Lafferty reports, in 1947 “the CAS estimated that the annual cost of raising a child was approximately \$492.12. However, the combined municipal and provincial grant for neglected children to the institutions was only \$5 per week, or \$260 per year.”<sup>737</sup> As a result, the general physical conditions of the institutions suffered, but so did the care that could be given to children. Historical reports from the Halifax Infants’ Home indicated that “[o]ne of the biggest problems’ identified in the 1940s ‘was the inability to give sufficient individual attention to the toddlers group and ...[a] lack of funds was the chief reason.’”<sup>738</sup> The degenerating conditions of the institutions were proof positive of the dangers of institutionalization raised by child development experts. Finally, the 1960s saw the closing of the asylums and institutions of the 19<sup>th</sup> and early-20<sup>th</sup> century in Halifax, including: the Halifax Infants’ Home (1960); Halifax Visiting

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<sup>735</sup> *Ibid* at 12.

<sup>736</sup> Lafferty, *The Guardianship of Best Interests*, *supra* note 436 at 181.

<sup>737</sup> *Ibid* at 167.

<sup>738</sup> *Ibid*.

Dispensary (1965); Indian Residential School at Shubenacadie (1967); and the Protestant Orphanage (1969).<sup>739</sup> One noteworthy exception was the Nova Scotia Home for Colored Children which continued to operate. As Lafferty explains, the Home “moved through the period with many of its program goals virtually unchanged. Ethnic prejudice in the postwar years trumped even the now-trusted claims of social workers about the damaging effects of congregate care.”<sup>740</sup>

But suitable adoptive and foster homes were scarce in the years leading up to the culmination of de-institutionalization.<sup>741</sup> Ensuring that suitable mothers were not placing their children with the CAS or in the city’s denominational institutions by reason of poverty was an important means of helping to reduce the number of children within these institutions. Mothers’ Allowances, then, became one prong in the strategy to de-institutionalize the child welfare regime in place in Halifax in the post-war era. The second prong in the strategy was to revitalize CAS “to carry out the work of protection and prevention” while ensuring that the institutions performed a merely residual role.<sup>742</sup> Home visiting and the imparting of this new psychiatric knowledge on the family would also ensure that Mothers’ Allowance was only going to fit and proper families who were providing requisite maternal attachment for well-developed children.<sup>743</sup>

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<sup>739</sup> Senior Scribes, *supra* note 135.

<sup>740</sup> Lafferty, *The Guardianship of Best Interests*, *supra* note 436 at 194.

<sup>741</sup> *Ibid* at 187.

<sup>742</sup> *Ibid* at 192.

<sup>743</sup> For instance, in her chapter on reform of the *Poor Law*, Janet Guildford explains that social workers were opposed to the *Poor Law* in part because of the “problems of having untrained and unpaid overseers of the poor make decisions about people’s eligibility for relief.” See Guildford, “The End of the Poor Law”, *supra* note 671 at 59.

The caseload of the CAS had been steadily rising from the late-1920s to the post-war era. Data from a retrospective study of the CAS of Halifax for the years 1920 to 1970 indicates that in 1928 the caseload of the Halifax CAS increased dramatically. Although the CAS had a large caseload only 27 were made wards of the CAS by the court that year.<sup>744</sup> This means that the other almost 1100 cases involved the supervision and visiting of families. The retrospective CAS study provides the following explanation:

During 1928, there were 1,122 active cases, of which 918 were new cases. The work involved cases of reported neglect of children by parents, referrals for removal of children from homes because of poverty, cases involving children of widows, and of children who were behaviour problems. In this latter category the need was felt for a behaviour clinic where the parents could be instructed as to the proper treatment for these difficult children. Many referrals were received for temporary care of children because of illness of the mother and these children were placed in the children's institutions in the City. The work also included supervision of many children (154) who were with parents, relatives, and in boarding homes. Investigation of 86 foster homes was completed, and in this program the Society was not able to develop boarding home care as it would like mainly because of the lack of funds.<sup>745</sup>

It was the next year, 1929, that the CAS was asked to become involved in introducing the Mothers' Allowance regime for needy widows and for the wives of men who were incapacitated (passed the year after that in 1930).<sup>746</sup> For the year 1929 – the start of the Depression – the number of cases of the CAS had risen to 1377. After the passing of the *Mothers' Allowances Act* the work of the Agency increased by approximately 100 cases a year.<sup>747</sup> By the end of the Second World War, the CAS caseload in the city had risen to 2261 cases.<sup>748</sup> For the first decade after the war, the caseload of the Society continued to

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<sup>744</sup> Jacobson, *A Better Deal for Children*, *supra* note 495.

<sup>745</sup> *Ibid* at 16.

<sup>746</sup> *Ibid*.

<sup>747</sup> *Ibid* at 19, 21.

<sup>748</sup> *Ibid* at 24.

rise, as did the number of wards of the Society. By 1950 there were 278 children who were made wards of the Society.<sup>749</sup> Reports from the CAS indicate that after the war a myriad of social problems increased pressure on the Agency to remove children from the home because of “economic reasons”.<sup>750</sup> The social problems contributing to calls for removal of children included “re-adjustment of the father to the home, an increase of unemployment, a housing shortage, poor housing standards, health problems, the absence of children from school because of a lack of clothing.”<sup>751</sup>

Despite the increase in the number of children made wards of the CAS, the post-war work of the Society focused not on institutionalizing and removing children from the home, but rather on preventive social work to keep the children – of certain families – in the home.<sup>752</sup> While classical liberalism was bound up with notions of the competitive,

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<sup>749</sup> *Ibid* at 30.

<sup>750</sup> *Ibid* at 28.

<sup>751</sup> *Ibid* at 28.

<sup>752</sup> As Shirley Tillotson’s chapter on “The Eclipse of Gwendolyn Lantz” explains, however, this reform at Halifax CAS was not possible without the eventual firing of the head of Halifax CAS in 1952. Tillotson provides a pertinent example of Lantz’s child protection philosophy which presented an obstacle for the preventive work of the CAS into the 1950s:

In November 1946, Lantz had taken into CAS care a boy whose parents had separated and whom she deemed was neglected. She placed him in one of the Halifax orphanages. Just over a month later, in January 1947, his parents reconciled and asked to have their child returned. Lantz refused, asserting that they could not provide a suitable home. Over the next fifteen months they continued to appeal to Lantz. She persistently rejected their appeals. In March 1948, on request of the President of the CAS, MacKinnon’s department investigated the parents and their home. MacKinnon’s department served as the CAS for Halifax County and so had on its staff several social workers who routinely did these sorts of investigations. The two social workers assigned to assessing the case both concluded that the home was ‘completely satisfactory’ and recommended that the boy be returned to his parents. However, it was only after nearly another full year had passed, in July 1949, *more than two years* after he had been initially apprehended, that Lantz gave consent to have the boy returned to his home. MacKinnon concluded his summary of the case by observing (with what must pass for passion in a civil service memo): ‘It is extremely difficult to rationalize this kind of action or to understand [Lantz’s] reasoning in this particular case.’

In this story, MacKinnon was illustrating one of the general complaints about Lantz – that she put children in institutions and left them there for so long that their ties to their families and communities were deeply harmed.

abstract individual, the individual of the burgeoning welfare state was “the embodied individual of the Keynesian welfare state with concrete material needs and diverse cultural commitments”.<sup>753</sup> As Hester Lessard explains in her article, “Empire of the Lone Mother” the effect that this new thinking about the individual and the state's role in providing for the individual, had on child protection and practice was “a more explicit and expanded focus on welfare rather than one limited to protection”.<sup>754</sup> In commenting on Ontario’s 1954 *Child Welfare Act*<sup>755</sup> Lessard argues that, as opposed to earlier legislation the ideology of public responsibility of the era of the welfare state was present in Ontario’s 1954 *Child Welfare Act*.<sup>756</sup> So too, did this ideology of public responsibility and welfare permeate Nova Scotia’s de-institutionalizing child welfare scene. By the mid-1950s, as Shirley Tillotson has explained, “Public and private responsibilities in child welfare were becoming ever more thoroughly mixed” and provincial funding of the Halifax CAS alone had more than quadrupled since the beginning of the decade.<sup>757</sup>

The mid-1950s saw social workers drawing upon preventive casework and relying on non-material means to keep the family together: providing diagnostic and therapeutic support in an aim to keep the family together. As the CAS Report indicates:

The preventative side of the work of the agency was stressed more and more during the last few years of this period [1953], and resources utilized to find ways to

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See Shirley Tillotson, “Democracy Dollars, and the Children’s Aid Society: The Eclipse of Gwendolyn Lantz” in in Judith Fingard and Janet Guildford, eds, *Mothers of the Municipality: Women, Work, and Social Policy in Post-1945 Halifax* (Toronto: University of Toronto Press, 2005) 76 at 87.

<sup>753</sup> Lessard, “Empire of the Lone Mother”, *supra* note 116 at 732.

<sup>754</sup> *Ibid* at 735.

<sup>755</sup> SO 1954, c 8.

<sup>756</sup> Lessard, “Empire of the Lone Mother”, *supra* note 116 at 735.

<sup>757</sup> Tillotson, “Democracy Dollars, and the Children’s Aid Society”, *supra* note 752 at 97.

prevent dependency, neglect and delinquency of children, to know the assets and to learn how best to make use of them – not alone the assets of the child within himself, but also those of his whole family situation. Some of the situations faced and presenting problems were presented as effectively as possible. Many marital problems were presented and counseling attempted, but hampered because of lack of staff. However with some families, referrals were made to other community resources. The agency was often approached by the deserted wife who had little or no means of support, and there was no way at this time by which financial aid could be secured in order to preserve the family unit. This situation should have been met as the Mothers Allowance meets the needs of the widow and her children, and did become a reality in 1956 when the Social Assistance Act became law.<sup>758</sup>

The therapeutic side of preventive work was informed by the increasingly professionalized nature of social work in the province. Nova Scotia's public welfare state developed in tandem with an expanding and professionalizing field of social work in the 1940s and 1950s. In Nova Scotia, 1941 saw the establishment of the Maritime School of Social Work.<sup>759</sup> 1944 saw the CAS form a province-wide Association of Children's Aid Societies and receive more funding from the newly-created Department of Public Welfare. The *ad hoc* and voluntarist nature of philanthropic child protection work that was in place in the late-19<sup>th</sup> and early 20<sup>th</sup> century, was overtaken by an increasingly bureaucratized, centralized and professionalized social welfare institution in the 1940s and 1950s.<sup>760</sup>

No longer would the good will of charitable volunteers suffice to assist families. Instead, the belief from social assistance quarters, and increasingly, from CAS quarters in the mid-to-late 1950s, was that a trained social worker with the skill to diagnose and work within the family was needed in order to understand and ameliorate the complex problems leading to poverty and neglect.<sup>761</sup> The professional social worker had to have "some acquaintance with psychology, mental testing, mental hygiene, sociology, dietetics,

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<sup>758</sup> Jacobson, *A Better Deal for Children*, *supra* note 495 at 32.

<sup>759</sup> Fitzner, *The Development of Social Welfare*, *supra* note 138 at 53.

<sup>760</sup> Lubove, *The Professional Altruist*, *supra* note 507 at 158.

<sup>761</sup> Gleason, *supra* note 670 at 42.

biology, medicine, and industrial conditions.”<sup>762</sup> Whereas volunteers used a “crude classification (worthy, unworthy, drunkard, pauper, deserter)”, social workers used individual casework to investigate the background of each case and discover what ailed the family.<sup>763</sup> As Roy Lubove explains in his book, *The Professional Altruist*:

Case records had to be kept, demonstrating the steps in investigation and treatment, not only as a guide to the agent or visitor, but as a basis for future research into the causes of poverty and of individual and family demoralization. Facts and more facts were needed, according to a Conference of the Boston Associated Charities, for “two-thirds’ of the errors in philanthropy work arise from misinformation or lack of information. In thorough preliminary investigation, followed by an intelligent, sympathetic searching into the facts on the visitor’s part, lies our chief strength as a practical body of scientific workers.”<sup>764</sup>

While previously, psychiatric and psychological knowledge developed in the children’s homes, nurseries and asylums had focused on the individual child, the family was becoming the focus of this scientific casework. The family was understood as the site of the production of either the emotionally disturbed or well-adjusted child.<sup>765</sup> As one historian explains:

During the 1950s and 1960s, a group of clinicians in the United States developed a psychotherapeutic approach to treating mental illness that located the source of pathology and the potential for cure in the cyclical patterns of family interactions rather than in the biological or psychological characteristics of an individual. Their approach became known as family therapy, and in the field’s development we can see many of the tensions that defined postwar America in a new way.<sup>766</sup>

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<sup>762</sup> *Ibid.*

<sup>763</sup> *Ibid* at 20.

<sup>764</sup> *Ibid.*

<sup>765</sup> For a thorough discussion see: Deborah Weinstein, *The Pathological Family: Postwar America and the Rise of Family Therapy* (Ithaca: Cornell University Press, 2013).

<sup>766</sup> *Ibid* at 2. At 16 Weinstein states the following:

Family therapists produced a new definition of what a family could be— namely, a unit of disease, which had previously been contained in individual bodies. Furthermore, twentieth-century American views of the family as the site of both reproduction and socialization, nature and culture, shored up the legitimacy of therapists’ focus on the family as such. The new definition of family as a unit of disease not only transformed the category

The preventive work of the CAS in the post-war years was influenced by this emphasis, on the one hand, on keeping the “natural” family unit together through casework and family therapy, but on the other hand, an understanding that this natural family unit was also the source of pathology.

Increasingly, however, one member of the family came under scrutiny in the search for the pathological counterpart to the natural, normal family: the unwed mother. In the mid-40s and 50s, psychiatric knowledge focused on the deficits of the unwed mother and the beneficence of her giving up her child for adoption. The growing influence of psychology and psychiatry on social work and the provision of welfare services meant that medical definitions and treatment of unwed mothers were starting to take center stage.

For example, Dr. John Bowlby described and diagnosed the woman who became pregnant out of wedlock as “neurotic” or “psychopathic or defective”<sup>767</sup>, “emotionally disturbed”, “immature” and “antisocial”.<sup>768</sup> In language echoing earlier calls for the study and prevention of feeble-mindedness, Bowlby warned that intervention was needed – either through prevention of birth or through adoption<sup>769</sup> - as these antisocial characters were sure to breed another generation of deprived and no doubt antisocial characters:

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of “family” and the meaning of “disease” but also prompted the development of new therapeutic techniques and goals. By shifting their clinical acumen from the individual to the family, early family therapists opened up space for a new set of practices that would then be appropriate for treating family-based disease. In so doing, they reconfigured the relationship between midcentury therapeutic culture and contemporaneous concerns about family life. That reconfiguration happened not just in prescriptive literature about what families should be but in the active realm of therapeutics and the development of new practices and techniques that shaped what happened in therapy sessions during the 1950s and 1960s.

<sup>767</sup> Bowlby, *Maternal Care and Mental Health*, *supra* note 661 at 94.

<sup>768</sup> *Ibid* at 95.

<sup>769</sup> *Ibid* at 96.



[I]n a Western community, it is emotionally disturbed men and women who produce illegitimate children of a socially unacceptable kind. Moreover, they give further prominence to the social process already emphasized as being of the greatest consequence for the production of children who will grow up deprived of maternal care – the process whereby one generation of deprived children provides the parents of the next generation of deprived children.<sup>770</sup>

This psychiatric position on the psychological influence of the unwed mother informed case work by the CAS in Halifax. While mothers' allowances allowed children to stay in the home of deserving mother-headed families, this psychiatric discourse on the abnormal mothering of the unwed mother helped to deem her as presumptively unfit. Early intervention with unwed mothers meant that children could be placed into normal and morally upright homes through adoption. Providing adoption services to unwed mothers became seen as a necessary corollary to the casework of the Society:

More emphasis was placed in working with the unmarried mother in dealing with her emotional problems, their (sic) feelings and attitudes. In the adoption program it was gratifying to see that 49 children were in adoption probation homes (of whom about half were infants of unmarried mothers and the rest wards of the agency).<sup>771</sup>

Jacobson's data from the CAS records reveals that in 1954, the Halifax CAS began to provide "intensive casework service to the unmarried mother and assist them in planning for their infants."<sup>772</sup> Jacobson reports that in 1954 there were 96 children born of unwed mother in Halifax. Of those, 16 were voluntarily placed for adoption, and 10 were made wards of the agency.<sup>773</sup> Therefore, even in the midst of these processes concentrated on "familialization" over a quarter of children born to unwed mothers were still being relinquished, either voluntarily or forcefully, to the CAS.

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<sup>770</sup> *Ibid* at 95.

<sup>771</sup> Jacobson, *A Better Deal for Children*, *supra* note 495 at 41.

<sup>772</sup> *Ibid* at 34.

<sup>773</sup> *Ibid*.

Jacobson's data is also consistent with research conducted by historian Suzanne Morton which reveals that after 1945, unwed mothers – particularly white unwed mothers – were actively encouraged by the CAS to give their children up for adoption.<sup>774</sup> Interestingly, she notes that this was a complete about-face from the policy of the maternity homes before 1945.<sup>775</sup> Before 1945, the Catholic Home of the Guardian Angel and the Protestant Halifax's Infant Home insisted on mothers remaining in confinement for six months after giving birth in order to ensure that they had the appropriate “mother love” to engender a sense of responsibility in the mother for the child, helping to ensure the child remained with the mother.<sup>776</sup> Morton writes that post-1945 the professional social worker “sought to rehabilitate young girls through encouraging them to relinquish their child and 'resume the roles of normative young women'”.<sup>777</sup> Experts at the time saw unwed motherhood not as the consequence of a lack of reproductive education or means of birth

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<sup>774</sup> It is important to note, however, that the situation would likely have applied largely to white unwed mothers. Research suggests that African Nova Scotian unwed mothers likely would have kept their children and raised them in extended families. This in part was due to the fact that adoptive placements for African Nova Scotian children would have been fewer than those for “able-bodied” white children. See Susan B Boyd et al, *Autonomous Motherhood?: A Socio-Legal Study of Choice and Constraint* (Toronto: University of Toronto Press, 2015) at 22-23.

As late as 1947 the lack of support for African Nova Scotian mothers as a result of racial segregation was raised at the Halifax Infants' Home board meeting. In her book, Lafferty details this concern:

In 1947, for example, “[t]he problem concerning [the] colored unmarried mother” and her child was raised at a Board of Management meeting at the Halifax Infants' Home. Limited accommodation for infants, as well as long waiting lists at the Nova Scotia Home for Colored Children (NSHCC), meant that black mothers were unable to get adequate services and support, and it was evident that the colour-blind approach adopted by managers in the early twentieth century had eroded.

See Lafferty, *Guardianship of Best Interests*, *supra* note 436 at 169.

<sup>775</sup> Morton, “Nova Scotia and Its Unmarried Mothers”, *supra* note 571 at 337.

<sup>776</sup> *Ibid* at 337.

<sup>777</sup> *Ibid* at 338.

control, but of “a conscious form of rebellion or a manifestation of deep-rooted psychological problems”.<sup>778</sup>

While mothers’ allowances were provided to some mother-headed and functionally mother-headed families under a veil of suspicion, they were not extended to unwed mothers at all until the province received federal funds. Furthermore, when unwed mothers asserted their need for assistance, this need was depicted as dependent and in itself pathological.<sup>779</sup> In 1966, when the Minister announced that the province had extended assistance to unmarried mothers, he also announced that child welfare casework supervision would likewise be extended.<sup>780</sup> Therefore, the social stigma around unwed motherhood was reinforced by psychological theories of “maternal deprivation” and psychiatric evaluations that unwed mothers were immoral or emotionally disturbed.<sup>781</sup> This psychiatric construction served to move the moralizing about unwed mothers and their promiscuous and unsavoury behaviour into objective, medicalized and normalized terms. In turn, this normalizing informed and was in turn informed by their exclusion from Mothers’ Allowances, their construction as “dependent” and therefore, the need to extend surveillance over these families in the form of child welfare services.

In the 1950s, even before their acceptance on social assistance, this social stigma, lack of social assistance and lack of family support would have meant many of these women would not have been able to support their children alone. For many women adoption would have seemed to be the only viable option. Research by Morton indicates that in 1950,

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<sup>778</sup> *Ibid* at 337.

<sup>779</sup> Jeanne Fay, “The ‘Right Kind’ of Single Mothers: Nova Scotia’s Regulation of Women on Social Assistance, 1956-1977” in Guildford and Fingard, eds, *Mothers of the Municipality: Women, Work and Social Policy in Post-1945 Halifax* (Toronto: University of Toronto Press, 2005) at 143.

<sup>780</sup> *Ibid* at 147.

<sup>781</sup> Gleason, *supra* note 670 at 40.

while there were 1184 illegitimate births reported in Nova Scotia, the philanthropic homes for unwed mothers only accounted for 358 infants.<sup>782</sup> She likewise reports that into the 1930s the Poor House register listed pregnant women in residence.<sup>783</sup> This construction of unwed mothers as undeserving and dependent, not only had consequences in terms of a repressive engagement with both child welfare and social assistance (not to mention psychiatric) professionals, but their social and economic marginalization, as well as a failure to address their needs through public assistance and public services, left their children vulnerable to unregulated services. Amidst this social stigma and lack of support emerged the scandal of the Ideal Maternity Home. The case of the Ideal Maternity Home is a poignant illustration of the desperate situation many of these women found themselves in, the lack of provincial support provided them, and the distrust these women had for the CAS.

The Ideal Maternity Home in East Chester was a privately run home for unwed or even poor, wed mothers. The Home facilitated private international and domestic adoptions. Some estimates indicate that over the years 1500 children were born at the Home in its almost 20 year history, beginning in the late 20s.<sup>784</sup> By the mid-1940s the Home was the largest maternity home east of Montreal.<sup>785</sup> The Home provided a private means for women to give birth out of the public eye but was plagued by scandal, with stories of the murder of children, particularly disabled children that were thought to be

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<sup>782</sup> Morton, “Nova Scotia and its Unmarried Mothers”, *supra* note 571 at 334.

<sup>783</sup> *Ibid* at 335.

<sup>784</sup> Karen Balcom, “Scandal and Social Policy: The Ideal Maternity Home and the Evolution of Social Policy in Nova Scotia in Nova Scotia, 1940-51” (2002) XXXI.2 *Acadiensis* 3 at 3.

<sup>785</sup> Morton, “Nova Scotia and Its Unmarried Mothers”, *supra* note 571 at 336.

undesirable for adoption.<sup>786</sup> While these murders were never substantiated, records from the time indicate terrible conditions and little to no assessment of adoption placements or post-adoption services to women.<sup>787</sup> In 1946, the CAS investigated the Home and brought many of the troubles there to light, resulting in the closure of the Home the following year. Morton indicates that even though public welfare bureaucrats took great pains to publicly shame and shut down the Home, many unwed pregnant and single mothers from the Home were placed in the Halifax City Home or the poor house, indicative of these women's status as second class citizens.<sup>788</sup>

The Ideal Maternity Home scandal became a flashpoint for bureaucrats such as Fred MacKinnon, the Director of Child Welfare, to argue for maternity homes to come under the control of Public Welfare through a licensing system, and for the reform of the *Illegitimate Children's Act*.<sup>789</sup> In the end, the situation gave rise to the regulation of maternity homes in the 1950 Act for the first time. In 1951, the *Illegitimate Children's Act* was repealed and the *Children of Unmarried Parents' Act* introduced, which gave unwed mothers the ability to directly bring an action against the putative father for support. The message from government continued to be that despite expanding eligibility for Mothers' Allowances, financial responsibility for unwed mothers was a private, not a public responsibility. Indeed, MacKinnon and the public welfare bureaucracy could have used the Ideal Maternity Home scandal to argue for the need for public assistance for unwed mothers but instead they used it to argue for a licensing system for maternity homes.

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<sup>786</sup> *Ibid* at 337.

<sup>787</sup> Balcom, "Scandal and Social Policy", *supra* note 784 at 12.

<sup>788</sup> Morton, "Nova Scotia and Its Unmarried Mothers", *supra* note 571 at 336.

<sup>789</sup> *Ibid* at 336.

In 1944, a Royal Commission on Provincial Development and Rehabilitation published a Final Report on improvements to public welfare in the province. Among the recommendations was greater financial support to unwed mothers. Unlike MacKinnon, Commissioner Davidson used the example of commercial maternity homes such as the Ideal Maternity Home to highlight the need for both a recognition of the mother's right to keep her child and a social responsibility for unwed mothers.<sup>790</sup> He provided the following critique of the plan to simply license commercial maternity homes.<sup>791</sup>

It should be constantly kept in mind that the reason why commercialised maternity homes come into existence and flourish is because no adequate social facilities are available to provide the necessary care and help to the unmarried mother and her child. It is not, therefore, sufficient to put out of business, or to establish minimum control over, commercialised maternity houses operating in this field. . . . It is even more important that the province should assume the responsibility of developing, through its Child Welfare Branch and through the Children's Aid Societies of the province, a case work service that will adequately meet the needs of the unmarried mother in her period of difficulty.<sup>792</sup>

But as Karen Balcom has argued, Davidson's arguments for greater self-determination for single-mother-headed families may have been naïve and premature for conservative post-war Nova Scotia. Balcom argues that Davidson's recommendations

[i]gnored the very good reasons unwed mothers had for placing a high value on secrecy and distrusting intrusive social workers. Approaching public officials for help, even if those officials were sympathetic, meant braving public knowledge of the pregnancy. It was difficult, for instance, for social workers to investigate the mother and her background without alerting family and friends of her pregnancy. Turning to social workers for help could only be as attractive as Davidson assumed if there was a radical change in public attitudes toward the single pregnant woman, an unlikely revolution in thought and practice.<sup>793</sup>

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<sup>790</sup> Balcom, *supra* note 793 at 29.

<sup>791</sup> See George Davidson, *Report on Public Welfare Services in Nova Scotia, Royal Commission on Provincial Development and Rehabilitation*, Volume 4 (Halifax, 1944).

<sup>792</sup> Per George Davidson, 1944, in Balcom, *supra* note 793 at 28.

<sup>793</sup> *Ibid* at 29.

The outcome of the Ideal Maternity Home Scandal illustrates how moral stigma, backed by ostensibly objective psychiatric and psychological evidence, justified a lack of state support for certain family forms despite this era of increased social responsibility. Unwed mothers were encouraged by child welfare experts to give up their children for adoption rather than justify their support as a matter of public responsibility, their request for welfare was depicted as an indication of their “dependence”<sup>794</sup> and their desires to keep their children were depicted by child development experts as neurotic and pathological.

The implication of psychiatric knowledge about the unwed mother and child development was that while maternal deprivation resulted from the removal of children from natural normal families, it was in the best interests of children to be removed from unwed mothers. While financial problems limited the choice of unwed mothers to keep their children, this conservative moral regulation deprived them of public support provided to other families. It limited their ability to self-determine as a family and to maintain custody of their children. This is not to argue that one field of knowledge necessarily created the other, but rather to show how these three areas – social policy, child welfare practice and child development knowledge – converged on the problem of the unwed mother. In presuming these mothers unfit, however, while failing to provide them with public services, their children were not only exposed to potentially coercive and traumatic interventions on behalf of the state, but as the Ideal Maternity Home scandal reveals, children born to these women were put in grave danger by a lack of supportive services on behalf of child welfare and social assistance.

The policy of encouraging unwed mothers to give their children up for adoption, however, was met with resistance by the unwed mothers themselves. Appearing in the late 1940s and into the 1950s is a series of cases dealing with unwed mothers subsequently

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<sup>794</sup> Fay, *supra* note 779 at 143.

revoking their consent to adoption. In the context of unwed mothers seeking to have their children returned to them – having agreed to adoption in moments of crisis – the courts had to articulate the circumstances under which their consent could be dispensed with. By examining these cases we gain insight on whether and how the law assisted in or challenged this regulation of the unwed mother. In the next section I will show how the Supreme Court of Canada articulated a concept of “natural parental rights” based on an interpretation of the common law and the *Adoption Act*. The articulation of “natural parental rights” permitted the superior courts (and by the 1960s, the family courts) to articulate a liberal legalist framework for the adjudication of child welfare decisions and reclaim expertise over public custody decisions that had largely been relegated to the specialized expertise of the Juvenile courts.

### **The Jurisprudence of “Natural Parental Rights”**

The era of de-institutionalization did not result in the provision of supportive services to unwed mothers and their children such as income and housing maintenance services. CAS policy in the mid-1940s became focused on providing adoption “services” to unmarried mothers. This meant that when an unmarried woman chose to keep her child the answer was for CAS to intervene and to encourage these mothers to place the children with them, into foster families – and still for many children, in institutions – awaiting adoption.<sup>795</sup> A mother who voluntarily gave up her child for adoption (or who was convinced by the CAS to do so) could still regain custody of the child by bringing a *habeas corpus* application to the Supreme Court. The *Adoption Act* regulated when her consent to adoption could subsequently be dispensed with should she choose to revoke it. Since

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<sup>795</sup> Jacobson, *A Better Deal for Children*, *supra* note 495 at 34.



1896, Nova Scotia's *Adoption Act*<sup>796</sup> had provided that where a child was illegitimate no order for adoption could be made without the mother's consent unless she was found to be the type of persons whose consent should be dispensed with.<sup>797</sup> In other words, the legal capacity of the mother to consent to the adoption was predicated on her being found to be a fit and proper mother, predicated not only on her ability to financially support the child, but to raise the child in a moral and upright manner.<sup>798</sup> As discussed in Chapter 2, despite this overt moralizing, these provisions of *Adoption Act* in effect served to protect a legal sphere of privacy for unwed-mother-headed families by asserting that outside parties could not simply take the illegitimate child from the unwed mother against her wishes.

However, as in often the case for marginalized families before the law, "the law on the books" did not match the "law in action". As the cases of *Martin v. Duffell*,<sup>799</sup> *Hepton v. Maat*,<sup>800</sup> and *Agar v. McNeilly*,<sup>801</sup> reveal, this revocation of consent was often met with resistance both by the CAS and by the courts. Mothers who gave their consent to adoption after receiving the "infant placement" services provided by the CAS found that if they

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<sup>796</sup> RSNS 1900, c 122.

<sup>797</sup> *Adoption of Children Act*, s 2(1)(d).

<sup>798</sup> *Ibid*, s 3(1). That the mother is incurably insane; is imprisoned in a penitentiary and has yet to serve three years at the time of the application; has for two years willfully deserted or neglected to provide proper care and maintenance for the child; has allowed the child to be supported by a charitable organization or as a pauper by the city; has been convicted of being a common drunkard, and neglects to provide proper care and maintenance for the child; or has been convicted of being a common night walker, or a lewd, wanton and lascivious person, and neglects to provide proper care and maintenance for such child. In 1921, the *Adoption Act* was amended to include a seventh ground upon which a person's consent could be dispensed with: if the child was found to be a neglected or delinquent child and was ordered delivered to the Superintendent of Neglected and Delinquent Children or to the CAS, pursuant to the *Children's Protection Act, 1921*.

<sup>799</sup> [1950] SCR 737, 4 DLR 1.

<sup>800</sup> [1957] SCR 606.

<sup>801</sup> [1958] SCR 52.

wanted to revoke their consent they either were not told of the child's whereabouts by the agency<sup>802</sup> involved or the courts found in favour of the adoptive parents.

From this trilogy of cases we see that a procedure began to develop in the courts such that when a mother had given her consent to adoption and the case was brought before the superior court, the court would take jurisdiction over the matter and turn it into a private custody determination, despite the fact that the mother was revoking her consent. In treating the case like any other private custody determination between a mother and a father, the court would weigh the relative positions of each party and make a determination as to the best interests of the child. The procedure was set out in the case of *Re Fex*:

Where a parent has signed a solemn consent to adoption under the provisions of The Adoption Act and the foster parents have taken the child and assumed their parental duties with a view to fulfilling the probationary requirements of the Act, I do not think that a child is to be restored to the natural parent on the mere assertion of that parent's right. I think the parent must go further and show that "having regard to the welfare of the child" it should not be permitted to remain with the foster parents.<sup>803</sup>

Based on its *parens patriae* jurisdiction, the court took it upon itself to engage in a determination of which family best served the welfare of the child. Rather than actually

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<sup>802</sup> Per Rand J in *Re Agar*, [1958] SCR 52:

Here, as in the case of *Hepton et al v. Maat et al*, there is the disturbing circumstance of a concealment of the child's whereabouts notwithstanding that, within a month and a half of its being handed over to the foster parents, the welfare agency, and within six months, those parents, knew the mother was seeking its return. It must, I think, be recognized that for the period of at least one year the transferred custody is provisional; until an order of adoption is made there is no obligation on the foster parents to keep the child nor on the part of the parent or parents to acquiesce in the new relationship. The consent of the latter to adoption may, by an order of the Court, be dispensed with, but until that is done there is always the possibility of the child's return. In that situation an aggravation of the conditions that would surround that possibility is to be highly deprecated. If the provisional character of the period is fully appreciated then the breaking of any ties between the child and the persons seeking adoption will cause them much less distress. More important, however, is the possible temporary effect upon the child. It would seem to me to be obvious good sense that once the issue is raised it should be disposed of as quickly as possible. If the welfare of the child is in reality the object of the social organizations and the parties desiring to adopt, under the existing statutory provisions there will be no delay in facilitating that determination.

<sup>803</sup> [1948] OWN 497.

testing the need for intervention, the court took the fact of the child's being before the court as reason enough to take jurisdiction over the matter and decide the child's placement. Much like the juvenile courts – which, as statutory courts obtained jurisdiction over the matter by finding the child to be a “delinquent”, for example – these superior courts subsumed any consideration of the presumption of autonomy of the family to a best interests determination.

*Martin v. Duffell*, the first case in the trilogy, dealt with the case of an unwed mother from England – Lily Aves Duffell – who had had a child in Ontario after visiting the province on holiday in 1947. The mother hid the pregnancy and birth of the child from her parents in England. While receiving pre-natal care at a clinic in Toronto, a laboratory technician, Mrs. Martin, befriended Ms. Duffell. After Duffell gave birth to her child, Mrs. Martin visited her in hospital and discussed with Duffell the possibility of adopting her child. On March 31, 1948, Duffell signed a consent to the adoption of her child. The child was handed over to Mrs. Martin the next day. However, on June 18, 1948, Duffell changed her mind and contacted her doctor and the CAS to try to get her baby back. Mrs. Martin advised her that she would give the baby back if Duffell obtained a letter from her parents stating they could provide a home for the baby. Duffell obtained a letter from her parents on December 28, 1948, stating that they wanted to adopt the baby. The Martins, however, were not willing to give up the baby.

An application was made to Surrogate Court to have the child returned to Duffell. The application was dismissed on the basis of *Re Fex*.<sup>804</sup> Instead, the trial judge held that the natural parent had the onus to show that it was in the child's best interests not to

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<sup>804</sup> *Ibid* at 739. On the basis that when a parent signed a consent to adoption and the child was placed with foster parents, the child should not be returned to the natural parent “on the mere assertion of that parent's right”.

remain with the foster parents.<sup>805</sup> On appeal, the Court of Appeal overturned the trial judge's decision and held that, before an adoption order was made, the court had the discretion to return the child to the mother if it was in the child's best interests.<sup>806</sup> The Supreme Court upheld the decision of the Court of Appeal:

In the present state of the law as I understand it, giving full effect to the existing legislation, the mother of an illegitimate child, who has not abandoned it, who is of good character and is able and willing to support it in satisfactory surroundings, is not to be deprived of her child merely because on a nice balancing of material and social advantages the Court is of the opinion that others, who wish to do so, could provide more advantageously for its upbringing and future. The wishes of the mother must, I think, be given effect unless "very serious and important" reasons require that, having regard to the child's welfare, they must be disregarded.<sup>807</sup>

The Supreme Court affirmed at law a presumption that the child belonged with the biological family – a determination of best interests could not be engaged upon until it was shown that intervention into this sphere of family autonomy was warranted. Only where the mother could be shown not to be "of good character and is [not] able and willing to support it in satisfactory surroundings" would intervention into the family be justified. Despite its moralizing character, the statement was important for the time in affirming that in determining whether or not to dispense of the consent of the natural parents, the case could not be treated the same as a case involving a contest between parents. With the *Duffell* decision, however, the Court was affirming that where the state was intervening to determine whether to deprive the parents of the care and custody of the child, a threshold

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<sup>805</sup> *Ibid.*

<sup>806</sup> Noteworthy, the Supreme Court also found in *Mugford v Children's Aid Society of Ottawa*, [1969] SCR 641 that a natural mother could also make an application to have her child returned to her after the child was made a ward of the Children's Aid Society with a view to adoption.

<sup>807</sup> *Martin v Duffell* at 741.

test had to be overcome in order to secure the liberty of the family as a discrete legal entity, against undue intrusion.

Shortly after the release of *Martin v. Duffell*, Nova Scotia's *Adoption Act* was amended.<sup>808</sup> Amongst others, the provision for dispensing with consent was amended and a provision was added providing that an adoption order was final and could not be subject to attack after one year from the date of order.<sup>809</sup> The consent provisions were updated to provide that consent could be dispensed with where the court was satisfied that a person was dead, or of unsound mind or could not be found in the Province or had willfully deserted or neglected to provide proper care for a child for two years or allowed the child to be supported by a charitable organization for two years.<sup>810</sup> The provisions from the 1923 *Adoption Act* dealing with a parent who is a drunk or "night walker" were repealed and a general provision was included providing that a person's consent could be dispensed with where they are "a person whose consent in all the circumstances of the case ought to be dispensed with."<sup>811</sup> The implication of the amendments was that the Legislature wanted to ensure that potential adoptive parents would not be dissuaded from adopting because of the potential of an order coming under attack, and to include a more general description of a person whose consent could be dispensed with. In the face of such a limitation on the already meager privacy rights of the unwed mother provided for in the 1896 *Adoption Act*, and the hostility that existed at the time against unwed mothers from CAS, child development and social assistance quarters, the Supreme Court trilogy became even more important in affirming the natural rights of parents.

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<sup>808</sup> *Adoption Act*, RSNS 1954, c 4.

<sup>809</sup> *Ibid*, s 14.

<sup>810</sup> *Ibid*, s 2.

<sup>811</sup> *Ibid*, s 2(f)

The second case in the Supreme Court of Canada “parents’ rights” trilogy – *Hepton v. Maat* – was handed down in 1957. The case involved a young married couple from Holland – she was 21 and he was 23 – who gave their consent to adoption of newborn twin boys. The father had been out of work and the couple feared they couldn’t provide financially for the twins. However, within two months of giving their consent to adoption they made their intention to revoke that consent known to the foster parents. At trial, the judge awarded custody to the foster parents on a consideration of the children’s best interests. The decision was overturned, however, by the Court of Appeal and upheld by the Supreme Court.

The case can be understood as essentially a more strongly-worded reiteration of the “rights” of natural parents to revoke their consent to adoption first articulated in *Martin v. Duffell*. The language of *Hepton v. Maat* is important for its characterization of the relationship between a child and their natural parents. Justice Rand began the decision by stating the following:

It is, I think, of the utmost importance that questions involving the custody of infants be approached with a clear view of the governing considerations. That view cannot be less than this: *prima facie* the natural parents are entitled to custody unless by reason of some act, condition or circumstance affecting them it is evident that the welfare of the child requires that that fundamental natural relation be severed. As *parens patriae* the Sovereign is the constitutional guardian of children, but that power arises in a community in which the family is the social unit. No one would, for a moment, suggest that the power ever extended to disruption of that unity by seizing any of its children at the whim or for any public or private purpose of the Sovereign or for any other purpose than that of the welfare of one unable, because of infancy, to care for himself.

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The view of the child’s welfare conceives it to lie first, within the warmth and security of the home provided by the parents; when through a failure, with or without parental fault, to furnish that protection, that welfare is threatened, the

community, represented by the Sovereign, is, on the broadest social and national grounds, justified in displacing the parents and assuming their duties.<sup>812</sup>

The Court held that the rule of law for centuries had acknowledged the natural law “which points out that the father knows far better as a rule what is good for his children than a Court of Justice can.”<sup>813</sup> Furthermore, the Court affirmed that this principle was in accordance with the principle that the paramount consideration in all questions of custody is the welfare of the child.

Finally, the third case in the trilogy – *Agar v. McNeilly* – involved the determination of a *habeus corpus* application brought by an unwed mother, Helen Agar, to regain custody of her child after giving her consent to adoption. At first instance, the mother was denied custody of the child. However, on appeal, Roach J.A. of the Ontario Court of Appeal overturned the trial decision and returned the child to the mother. The decision is important, first, for its contextualized understanding of what constituted a “voluntary” consent to adoption for an unmarried mother in the 1950s. Justice Roach asks at para 44:

Although she was under no pressure by [superintendent of the maternity home], she was under the pressure of the existing circumstances. What was she to do with her baby? She could not take it with her. Having indicated before its birth that she intended it should be adopted, why not sign the consent now that the time had come for doing so, and she did.

The case is also important for the evidence reproduced in the Court of Appeal decision to justify Justice Roach’s overturning of the initial rejection of the mother’s *habeus corpus* application. Before deciding the case, Roach J.A. set out that the proper approach after *Duffell* and *Maat* was to first “turn now to a consideration of Miss Agar's character,” then

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<sup>812</sup> *Hepton v Maat* at 606.

<sup>813</sup> *Ibid* at 609. Quoting from *Agar-Ellis v Lascelles* (1883), 24 ChD 317 at 337-8.

to “her ability to support her child in satisfactory surroundings,” and then finally to decide whether her wishes should be disregarded in the child’s best interests.<sup>814</sup>

On a review of the evidence, Roach J.A. did not find the mother’s marital status or fact that she gave up the child in the first place determinative. Instead, he was more persuaded by affidavit evidence from family and employers that she was industrious, hard-working, loyal and honest. In particular, Roach J.A. ordered the return of baby Agar on the following basis:

Applying the rule of law laid down in the *Re Baby Duffell* case there are no serious and important reasons that, having regard to the child's welfare, require the mother's wishes to be overcome. All the evidence indicates that she is a highly intelligent, ambitious, industrious, resourceful, steadfast woman and of good character. Her home is decent and respectable and she is not to be deprived of her child merely because her financial position is such that she has to go to work to support herself and her child and while at work leave it in the care of another person. It is common knowledge that today under the stress of financial circumstances there are many young matrons, the mothers of one or two small children, who daily go to work and leave the children in the care of other persons. The woman in whose care the appellant presently proposes to leave her child in those working hours is, on the evidence, a kind motherly person with the experience gained from raising her own family. The learned trial Judge thought that arrangement might not be permanent. If circumstances arise to terminate it, I think the appellant, being the type of woman she is, can be trusted to make other arrangements that will be equally respectable and otherwise adequate. She has a host of first cousins and an uncle and an aunt living nearby. If the appellant and her child were living together in this jurisdiction under comparable conditions, there would not be the slightest justification for taking her child away from her, and for myself I see no reason for this Court to deprive her of it. I would, therefore, allow the appeal and direct that the respondents deliver the child into the custody and possession of the appellant at the City of Toronto. This is not a case for costs; each party should bear their own.<sup>815</sup>

Even though an unwed mother had given her consent to adoption, evidence showing her good character could be persuasive in having her child returned to her. Of importance, however, in the face of such hostility towards unwed mothers by the CAS, was the assertion that state intervention had to be tested before a best interests determination

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<sup>814</sup> Para 24.

<sup>815</sup> [1957] OR 359, 8 DLR (2d) 353, at para 47.



could be carried out. Justice Roach’s decision was upheld by the Supreme Court of Canada on appeal. The Supreme Court affirmed that the proper approach when deciding whether to intervene and dispense with the natural parents’ consent to adoption was to first determine whether there were very serious and important reasons to refuse to give effect to the wishes of the natural parent. The Court again affirmed that this was in accordance with the principle that the welfare of the child was the paramount consideration: the welfare of the child, then, was presumptively provided for within the natural family until it could be shown otherwise.<sup>816</sup>

The trilogy not only reinforced the natural rights of parents – even unwed mothers – to their children, but also challenged determinations of a child’s best interests based on social class alone. Importantly, in *Hepton v. Maat* and then *Agar v. McNeilly*, as in *Martin v. Duffell*, the court articulated that a consideration of economic and social advantages should not persuade a court that the child was better off with a more well-to-do adoptive family. As Cartwright J. held in *Martin v Duffell*, reproduced above: “[a mother] is not to be deprived of her child merely because on a nice balancing of material and social advantages the Court is of the opinion that others, who wish to do so, could provide more advantageously for its upbringing and future.”<sup>817</sup> That is not to say, however, that in some instances judges, like Locke J. in *Agar v McNeilly*, were not quite blatant in what they felt the best interests of the child entailed:

I have examined with care the evidence given in this case and, while of the opinion that the child would be more likely to have a successful and happy life if left in the custody of the appellants, I have come, with regret, to the conclusion that, applying the rule as stated in the decisions of this Court in the cases of *Duffell* and *Hepton*, it has not been shown that the mother should be refused custody.<sup>818</sup>

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<sup>816</sup> *Ibid.*

<sup>817</sup> *Martin v Duffell* at 741.

<sup>818</sup> *Agar v McNeilly* at 54.

The impact of the trilogy was that natural parents, even those of families in poverty, ensured a presumptive right of families to their children and a right to revoke their consent to adoption. This right outweighed any judicial determination that a child's best interests would be better provided for in a more affluent family. The cases, then, were progressive in the sense that they contextualized the decision of unwed mothers to give up their children for adoption and recognized that the social and economic pressures that women were under at the time. In contextualizing their decisions, the court was challenging the CAS's depiction of these mother's consent as being the result of choice or free will. Further, in declaring, counter to child development, social assistance and CAS policy that unwed mothers were even *capable* of providing sufficient care for their children such as to require a testing – as opposed to just presuming the beneficence of – state intervention, the Court was in effect declaring on the legitimacy of unwed mother headed families and their right to a sphere of autonomy.

However, what is also evident from both *Martin v. Duffell* and *Hepton v. Maat*, and subsequent jurisprudence applying these cases, is that the concept of “natural parental rights” for unwed mother-headed and other marginalized families was not unconditional. Where poverty was caused by moralized notions of dependency and “pauperism”, no natural right could be said to exist. Only certain types of parents that fit the “normal” view of family would have these natural rights protected. Accordingly, the role that social class would play in adoption and in protection cases generally was more complicated than the jurisprudence would have us believe. In the case of *Martin v. Duffell*, although Duffel was an unwed mother, she had the support of middle-class parents. The Court recounted in its decision that the unwed mother's own father was a retired police sergeant in receipt of a pension and employed as a civil servant. The Court also recounted how the family lived in

a London suburb in a comfortable home “which they own clear of encumbrance”.<sup>819</sup> Clearly, the case of *Martin v. Duffell* was a case of two middle-class families arguing over custody of a child. We begin to see the contours of the family that will presumptively be accorded natural parental rights. While the mother alone may be determined to be deficient, a more holistic focus on the extended family as a whole was sufficient to ground a claim for natural parental rights. Where an unwed mother could nonetheless be shown to be from and have the support of a respectable family she may find her parental rights protected.

In the case of *Hepton v. Maat*, the Maats were young, white, Dutch immigrants and it is clear from the decision that the court found them to be morally upstanding people and although poor, they were a religiously, racially and sexually appropriate family. In the concurring Supreme Court reasons of Cartwright J., he quoted the following passage from Aylesworth J.A. with approval:

The evidence shows that the young parents, although of extremely modest means, are hard-working, religious people of respectable parentage. They are regular attendants at their church and have many friends in their community of the same racial strain as themselves.

...

I am quite unable to find anything in the evidence so far as the welfare of their children is concerned in impeachment of the appellants from a moral, spiritual or social viewpoint; reference has already been made to the economic situation, or even to the contrast in the economic situation, as between the appellants and the respondents, but the appellants are much younger than the respondents and have yet to make their way in their new country. As I have already said the evidence indicates that they are industrious and of good character...<sup>820</sup>

The industriousness of the Maats indicated that their poverty may be temporary and in fact they were not destined to be paupers. In the mental hygiene discourse of the day, these

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<sup>819</sup> *Ibid* at 739.

<sup>820</sup> *Hepton v Maat* at 610.

parents were not delinquent or dependent. In the final case of in the Supreme Court trilogy, *Agar v. McNeilly*<sup>821</sup>, handed down the year after *Hepton v. Maat*, the mother, Helen Agar, was similarly held to be of “good character” when evidence from employers and family showed her to be industrious and hard-working, though poor.

Therefore, while the jurisprudence of natural parental rights from the Supreme Court of Canada was progressive in that it secured the rights of even unwed mothers – so maligned in both psychiatric and social assistance discourse of the day – those unwed mothers were still required to fit the mold of the white, industrious, middle-class mother. In the next section I will show that while unwed mothers were increasingly depicted as deserving of support in the civil rights era of welfare discourse, unwed mothers who did not fit into a normalized, white notion of the unwed mother were increasingly excluded from this “natural” regime of parental rights.

### **The Contingency of Natural Parental Rights**

The jurisprudence of natural parental rights continued to evolve and strengthen from both the Supreme Court and from provincial appellate courts in the post-war era. In 1969, the Supreme Court dismissed an appeal from the Court of Appeal for Ontario in *Mugford v. Children’s Aid Society of Ottawa*,<sup>822</sup> allowing the return of the child to the natural mother after the child had been made a ward of the society in contemplation of adoption. The language in the Court of Appeal decision is indicative of the view of parents’ rights that was developing and the complicated relationship that this view had to questions of morality and social class:

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<sup>821</sup> [1958] SCR 5

<sup>822</sup> [1969] SCR 641.

One cannot over-estimate the importance to a child of living, moving and having its being in an environment shared by its own blood kin where it will enjoy the warmth and affection of the mother who gave it birth. These are but a part of the intangible values which flow from a custom deeply rooted in our way of life against which superior material advantages which a child may enjoy in the home of strangers in blood cannot accurately be measured on the most delicately balanced scales. The law is on the side of the natural parents unless for grave reasons, endangering the welfare of the child, the Court sees fit not to give effect to the parents' wishes.<sup>823</sup>

By the late 1960s, separating material advantage and the parents' rights to custody was consistent with public discourse on social assistance at the time. The late-1960s in Canada saw the emergence of a consciousness about poverty that was influenced at least in part by the agitations of the civil rights movements. In 1965, Lester Pearson had declared a war on poverty and increased levels of assistance to mothers and children in need.<sup>824</sup> 1966 saw the introduction of the Canada Assistance Plan (CAP), meant to expand welfare eligibility and target poverty regardless of "causes" of poverty (i.e., with eligibility not based on the status of being a widow, or deserted or unmarried, etc.).<sup>825</sup> In 1968, a Special Senate Committee on Poverty recognized that poverty was intimately linked with racial and sexual discrimination.<sup>826</sup>

Furthermore, a civil rights critique within welfare exposed the social as well as the economic causes of poverty. Women, this time both middle class professionals, and women on assistance, mobilized around the discourse of welfare rights.<sup>827</sup> They promoted awareness about both the gendered and raced determinants of poverty, particularly as it

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<sup>823</sup> Per Schroeder JA in *Re Mugford*, [1970] 1 OR 601, 9 DLR (3d) 113 at 121.

<sup>824</sup> Little, *No Car, No Radio*, *supra* note 68 at 139.

<sup>825</sup> Guest, *The Emergence of Social Security*, *supra* note 207 at 192.

<sup>826</sup> *Ibid* at 168.

<sup>827</sup> Fay, *supra* note 779 at 151.

related to families headed by single mothers. As a result, acceptance of the gendered and raced dynamics of poverty was laid out in 1970 in the *Report of the Royal Commission on the Status of Women in Canada* in particular with regard to sole-support mothers, elderly women and aboriginal women.<sup>828</sup> A federal white paper entitled *Income Security for Canadians* that came out the same year as the Royal Commission report, criticized Canada's social security system for failing to alleviate poverty in Canada.<sup>829</sup> Therefore, women's welfare and civil rights activism the late-60s and early 70s promoted a recognition that not everyone had benefitted equally from the welfare state of the post-war years. In their politicization of poverty they encouraged a recognition of the gendered and racialized aspects of poverty began to make its way into the analysis.<sup>830</sup>

This new awareness of the political dynamics of poverty and the agitation for rights for the poor was taking place in Nova Scotia as well, as rights groups organized for civil rights and recognition of the problems of racism and poor bashing.<sup>831</sup> With this discourse of civil rights came an analysis of racial and economic oppression which became articulated as "welfare rights". Welfare rights demanded that persons in poverty be entitled to the same recognition that all other beneficiaries of Canada's social security system had received in the post-war era. The movement demanded an end to the stigmatization of persons on assistance and a recognition of the inequalities inherent in the capitalist system.

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<sup>828</sup> Canada, *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Information Canada, 1970) at 309-331, online: Status of Women Canada <<http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/bird1970-eng/bird1970-eng.htm>>.

<sup>829</sup> Canada, National Health and Welfare, *Income Security for Canadians* (Ottawa: Queen's Printer, 1970).

<sup>830</sup> See Premilla Nadasen, "Mothers at Work': The Welfare Rights Movement and Welfare Reform in the 1960s," in Gavigan and Chunn eds, *The Legal Tender of Gender*, *supra* note 41 at 103.

<sup>831</sup> Fay, *supra* note 779 at 151.

While Canada was experiencing a relative renaissance in terms of the provision of social security in the post-war years, the administration of assistance to mothers in Nova Scotia was still circumscribed by a concern for ensuring their moral worthiness. With the expansion of benefits in 1966, Nova Scotia provided benefits not just to “deserving” widows, but to deserted and unwed mothers. CAP assisted in the opening up of eligibility to all mother-headed families with the federal government sharing financial responsibilities for these families.<sup>832</sup> However, as Jeanne Fay has argued, rather than accepting the federal expansion of eligibility, those in charge of actually administering welfare continued to be concerned with sorting out “problem mothers”.<sup>833</sup> Just after the introduction of the *Social Assistance Act*, literature coming out of the Department of Public Welfare tended to valorize the selfless foster mother while describing women on assistance as “victims of intergenerational poverty”.<sup>834</sup> Of particular note were the descriptions of African Nova Scotian women as “disadvantaged” and “deprived” and therefore the conflation not only of dependency and gender, but race, as well.<sup>835</sup>

Therefore, along with the welfare rights movement came a discourse of maternalism to challenge welfare’s casting of unwed mothers as undeserving. This era, however, exemplifies the flexibility of the maternalist discourse. On the one hand the welfare rights groups were able to mobilize the maternalist discourse as women demanding their rights to a pension based upon their reproductive labour. Yet women’s groups also used the maternalist discourse to reinforce the old moralizing discourse of maternalism from welfare’s past. For example, Fay writes of the Halifax Women’s Bureau

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<sup>832</sup> *Ibid* at 147.

<sup>833</sup> *Ibid* at 148.

<sup>834</sup> *Ibid* at 149.

<sup>835</sup> *Ibid*.

who organized to study the Report of the *Royal Commission on the Status of Women*. While the group was able to use Marxist language to critique the Department of Labour and unions for failing to adequately protect female workers, its analysis of the concerns of women on welfare reinforced the old stereotypes of the past.

In the case of unmarried mothers, however, the Women's Bureau drew upon the child welfare perspective to define them as 'girls' who needed proper sex education to prevent pregnancy, clearly implying that unmarried motherhood was inappropriate.<sup>836</sup>

Similarly, while the parents' rights trilogy of the Supreme Court contained elements of this concern for supporting the autonomy for low-income and unwed mother-headed families, it was also responsible for naturalizing a connection between parental rights and moral worthiness. While courts could not immediately turn to a consideration of best interests of the child – weighing the inevitable material advantage of the potential adopting parents against the better material position of the unwed mother – the Courts continued to be justified in first conducting an inquiry into the mother's fitness and "good character". A lack of evidence of "good character" would abrogate one's ability to assert their natural parental right to custody of the child.

This double-edged sword of natural parental rights was also evident in the child welfare jurisprudence in Nova Scotia at the time. Applying the Supreme Court trilogy to child welfare cases in Nova Scotia provided lone mothers with a sphere of autonomy not previously protected, but this autonomy was circumscribed by a focus on parental fitness. This focus is also consistent with the definition of "neglected child" and later, "child in need of protection" under the Act. However, it is telling that of the 12 enumerated grounds listed under the 1950 Act that would find a child to be neglected, one ground in particular

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<sup>836</sup> *Ibid* at 156.



was consistently relied upon in the jurisprudence – the ground of parental “fitness”.<sup>837</sup> As I have shown in the preceding chapters, philanthropic, religious, and moralizing discourses have been drawn upon in the history of child protection to establish “fitness” in various eras. Increasingly, however, courts in Nova Scotia adjudicating upon fitness and indeed, best interests of children, came to rely more upon a psychiatric or psychological rather than a strictly moralistic discourse in deciding child welfare cases. Rights to family autonomy were equated with normalcy and the ability to produce the normal, well-adjusted child, as opposed to the meeting overtly moralized criteria of worthiness. Furthermore, it appears that while the Department was willing to support legislative endeavours to bring decision-making more in line with a liberal legalist framework, its answer to the direction by the Supreme Court that more than mere poverty was needed to

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<sup>837</sup>The 1950 Act introduced a number of new definitions of neglect which were even more moralistic and even more vague than those contained in previous Acts. Of particular interest to the drafters of the Act was to craft definitions of neglect which were broad enough to capture any instance where a child was living in unfit or improper circumstances. The 1950 Act introduced a number of broad standards for determining a child to be a neglected child:

- 2(h)(iv) a child who is growing up under circumstances tending to make him idle, dissolute, delinquent or incorrigible; or
- ...
- (x) a child who is being cared for by a person other than his parents at such person's expense in circumstances which indicate that his parents are not personally performing their parental duties toward him; or
- (xi) a child who is in the charge of a person who by reason of illness, misfortune, infirmity or other cause is unable or unfit properly to care for and maintain him; or
- (xii) a child whose parents or parent have or has neglected or refused to provide or secure or permit to be provided or secured medical, surgical, or remedial care necessary for his health or well-being.

The first three grounds added to the 1950 Act were no doubt targeted towards parents that did not have the financial means to look after their children and had either given their children away or kept their children and who, by reason of idleness, infirmity, or misfortune, did not have the means to maintain a “fit” and “proper” home. While the services and assistance provided for by the Act may help to ameliorate a family's deteriorating material circumstance, the characterization of their situation as “misfortune” or “idleness” or unwillingness to provide “parental duties” would have had the effect of further stigmatizing those families living in poverty.

find a child neglected, was simply to expand the grounds upon which such a finding could be made.

### **The Legacy of the “Parents’ Rights Trilogy” in Nova Scotia and the Medico-Legal Regulation of the Unwed Mother**

Before the 1970s, there was very little jurisprudence issuing from the Supreme Court in Nova Scotia on child welfare matters, even though the *Child Welfare Act* had since its introduction in 1954 contained a provision allowing for appeal to the Supreme Court.<sup>838</sup> After the Supreme Court trilogy and an early application of the trilogy in the 1962 Nova Scotia case of *Re Perry*<sup>839</sup>, a small number of child protection decisions were appealed to the Supreme Court.<sup>840</sup> Furthermore, in 1968 the 1950 *Child Welfare Act* was amended to remove the category of “neglected” child and to introduce the concept of “child in need of protection”<sup>841</sup>. The definition of “child in need of protection sought to do away with the “fault-oriented” neglected child standard.<sup>842</sup> The “neglected child” standard from the 1950 *Child Welfare Act*, still contained aspects of the child cruelty and delinquent standards of neglect from the child protection’s early years. For example, a “neglected child” was defined as a child who:

- Is found begging or receiving alms, or stealing in any place whatsoever;

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<sup>838</sup> *Child Welfare Act, 1954*, s 35(1); *Child Welfare Act, 1967*, s 40(1).

<sup>839</sup> [1962] 33 DLR (2d) 216, NSJ No 10.

<sup>840</sup> *Re MJM* (1970), 3 NSR (2d) 293, 3 RFL 25; *Re Lou* (1971), 23 DLR (3d) 454; *GM v Family and Children’s Services of Hants County* (1971), 5 NSR (2d) 589 [while this is not an appeal but rather an originating application to terminate guardianship, it involves many of the same considerations as the other cases listed here]; *Re PJS* (1974), 15 NSR (2d) 93, 19 RFL 315 [hereinafter, *Re Sarty*]; *Re Milner* (1975), 58 DLR (3d) 593, 13 NSR (2d) 378 [this was an appeal by the CAS, not the parent].

<sup>841</sup> *Infra*, note 844.

<sup>842</sup> DA Rollie Thompson, *The Annotated Children and Family Services Act* (Halifax: Department of Community Services, 1991) at at 39.

- Is found associating or dwelling with a thief, habitual drunkard, vagrant, prostitute, dissolute, vicious or disreputable person of ill fame;
- Is delinquent or incorrigible;
- Habitually uses obscene, profane or indecent language or is guilty of immoral conduct.<sup>843</sup>

With the 1968 amendments, the harms which justified state intervention into the family evidenced a more concerted focus on the family as a psychological entity, and on an evaluation of parental conduct on more objective and less moralizing terms. The focus on the child as innocent or potential criminal from the child saving and delinquency eras was removed, as was the language of temperance and “dissolute” lifestyles from the philanthropic era. Instead, the definition of “child in need of protection” became focused not on the actions of the child or on the child’s status as a pauper, vagrant or delinquent, but on parental conduct:

- (i) A child who is without proper supervision or control;
- (ii) A child who is living in circumstances that are unfit or improper for the child;
- (iii) A child in the care or custody of a person who is unfit, unable or unwilling to exercise proper care over the child;
- (iv) A child whose life, health or emotional welfare is endangered;
- (v) A child who is in the care and custody of a person who fails to provide for his education;
- (vi) A child who is committed pursuant to paragraph (h) or (i) of subsection (1) of Section 20 of the Juvenile Delinquents Act (Canada), or
- (vii) A child who is in the care or custody of a person who refuses or fails
  - a. To provide or obtain proper medical or other recognized remedial care or treatment necessary for the health or well-being of the child, or
  - b. To permit such care and treatment to be supplied to the child when it is considered essential by a duly qualified medical practitioner.<sup>844</sup>

Not only would the CAS have to show that a child was in need of protection, but they would have to show “that it is the actions of the parent or guardian which have caused

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<sup>843</sup> 1950 Act, ss 2(h)(i) to (v).

<sup>844</sup> *Children’s Services Act*, SNS 1976, c 8, s 2(1)(l). The 1968 amendments were carried over to the 1976 Act.

the child to be a child in need of protection.”<sup>845</sup> The Supreme Court jurisprudence on parents’ rights had affirmed that absent compelling and important reasons the child’s place was in the home. Therefore, the concept of “child in need of protection” sought to establish that it was not just that the best interests of the child necessitated her removal from the home, but that the parent’s conduct was such that they were unable to care for the child.

Not only were the harms justifying state intervention into the private sphere of the family amended so as to remove some of the moralistic characterizations of parental conduct, but several cases decided in the early-70s indicate that the “parents’ rights” jurisprudence at the Supreme Court was indeed a powerful tool for parents to regain custody of their children. At a time when there was little recognition in the jurisprudence of the importance of safeguarding family autonomy against the state, the articulation of a jurisprudence of “natural parental rights” allowed for some recognition that this was not simply a determination of custody between two private parties. Articulating a “parents’ rights” jurisprudence allowed some consideration of the gravity of state intervention in making children wards of the CAS, and the need for the Agency to show important and serious reasons for this decision.

In the case of *Re M.J.M.*,<sup>846</sup> Hart J. of the Supreme Court, Trial Division, heard an appeal from a decision of Judge Hudson of the Family Court refusing to terminate an order for guardianship of the two children of the appellant. The case was clearly one which found the children in need of protection because of the mother’s poverty and misfortune, and not because of any other “objective” harm to the children. The mother and father in this case had married some 8 months before the birth of their first child and divorced two years

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<sup>845</sup> Nova Scotia, House of Assembly, Official Report of Debates (Hansard), (8 April 1976) at 1472 (Melinda Maclean).

<sup>846</sup> (1970), 3 NSR (2d) 293, 3 RFL 25.

after the birth of their second child. The mother was effectively a single mother as the father moved away to Toronto and appears not to have been involved with the family after this time. The mother had voluntarily placed the children in a foster home and was attempting to pay for their support by working at the Grace Maternity Hospital. However, she was unable to make her required payments and the children were found to be in need of protection by virtue of s. 1(h)(x) of the *Child Welfare Act*:

A child who is being cared for by a person other than his parents at such person's expense in circumstances which indicates that his parents are not personally performing their parental duties toward him.

The children were made wards of the Department. The foster parents wished to adopt the children. In an attempt to regain custody of her children before they were adopted, the mother applied to terminate the order for wardship. The appellant, who had been living in Montreal in search of gainful employment, worked closely with Catholic Family and Children's Services there in hopes of gaining the return of her children in Halifax. She submitted herself to psychiatric examination in Montreal and appeared at the hearing in Halifax with favourable reports from both the Welfare Agency in Montreal and a psychiatrist there. In refusing to terminate the wardship order, Hudson Fam.Ct.J. found that the reports submitted by the appellant were inadmissible as hearsay, and on the rest of the evidence he could not make a finding that the order should be terminated. He held that,

Had the evidence contained in the two letters been admissible, much more consideration would have been given to the mother's application for termination of guardianship...I was convinced that she loves [her children] dearly and that she tried very hard to convince the Court that she is a suitable person to give her children a home and could provide for them adequately.<sup>847</sup>

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<sup>847</sup> *Ibid* at para 14.

The mother, then, by reason of her poverty and an unusually strict evidentiary ruling, faced losing her children permanently. In overturning the lower Court's decision, Hart J. indicated that this was the very situation against which the parents' rights trilogy was meant to protect.<sup>848</sup> In quoting from *Hepton v. Maat*, Hart J. ruled that “*prima facie* the natural parents are entitled to custody unless by reason of some act, condition or circumstance affecting them it is evident that the welfare of the child requires that that fundamental natural relation be severed.” In the case at hand, Hart J. held that while the potential adoptive parents were providing an “excellent family environment”<sup>849</sup> for the children, there was no act, condition or circumstance which necessitated removing the children from the mother's care permanently. Justice Hart recognized that the mother had established a suitable environment for the children, despite her difficulties in providing for her children financially, with little help from family or the father. The Supreme Court held that there was no jeopardy to the welfare of the children in returning them to their mother.

The concept of natural parental rights continued to be an important tool to safeguard the family autonomy of traditionally marginalized families in Nova Scotia. In *Re Lou*<sup>850</sup> Gillis J. of the Supreme Court Trial Division reversed the lower court decision to terminate the guardianship rights of the racialized father of “illegitimate children”. Justice Gillis indicated that the decision to apprehend the children and make them wards of the society was due to racist motivations. In coming to his decision to overturn the lower court judge's decision not to terminate Lou's guardianship, Gillis J. criticized the actions of the CAS and the CAS worker as follows:

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<sup>848</sup> *Ibid* at para 21.

<sup>849</sup> *Ibid* at para 22.

<sup>850</sup> (1971), 23 DLR (3d) 454, 7 NSR (2d) 335.

My criticism of her, and I think of the Society generally, is in the attitude that a Chinese man, living in a white society, might direct the children, contrary to the wishes of that society and therefore he is incapable of having them, caring for them, or directing their development because he would instill in them something of a different culture.<sup>851</sup>

Judge Gillis found that there was no evidence to warrant a finding that the children had been in need of protection. Instead, the decision of the CAS and then of the judge below, appears to have been a determination based totally on the CAS's perceived welfare of the children, without first justifying their intervention. Justice Gillis held that, "The assumption throughout has been that the children would be better off in the custody of the Society than in the custody of their natural father. On this point, the evidence is a balancing of niceties assumed to be the desires of the society for such children" in opposition to what their father wanted for them.<sup>852</sup>

While the concept of natural parental rights provided important protections for some poor and/or racialized families, on the other hand, the concept was capable not only of challenging, but of reinforcing a moral regulation of some families in poverty. Determinations of fitness continued to be premised on racist, sexualized, gendered and classed determinations that were present, for example, at the trial level of both *Re MJM* and *Re Lou*. Three cases, in particular, that we have on the record were decided between 1971 and 1976 under the *Child Welfare Act, 1967: GM v. Family and Children's Services of Hants County*;<sup>853</sup> *Re Sarty*;<sup>854</sup> and *Re Cullen*.<sup>855</sup> All three reveal how natural parental

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<sup>851</sup> *Ibid* at para 42.

<sup>852</sup> *Ibid* at para 44.

<sup>853</sup> (1971), 5 NSR (2d) 589, 12 RFL 167

<sup>854</sup> (1974), 25 NSR (2d) 93, 19 RFL 315 (TD).

<sup>855</sup> (1976), 2 RFL (2d) 193, NSJ No 609.

rights could be equated with a white, heteronormative, middle-class notion of a normal family.

The case of *GM* involved the application of aboriginal parents for termination of a guardianship order. The parents argued that they had, since their child was taken into care three years earlier, gained control over their alcoholism, which had been a concern of the CAS in apprehending the children. Further, the parents were concerned that the child was going to be adopted by a white family and therefore would lose his heritage.<sup>856</sup> The parents brought four witnesses with them to court to testify that they now had their drinking under control and they had remedied the concern of the CAS sufficient to remove the circumstance that found the child in need of protection. While finding that there had been some credible evidence of the parents' rehabilitation, the Court refused to give much weight to the witness evidence:

I note that all of the witnesses called on behalf of the applicants are of the Indian race, and to this extent I consider that they have in interest in these proceedings. I don't disbelieve any particular witness but I point out that their evidence was generally of generalities and negative evidence, such as "I don't see him drinking", or "I didn't see them drinking", and, in general, it lacked the nature of evidence I feel I should accept on the question of drinking.<sup>857</sup>

Having determined that the evidence of the Indian witnesses of the applicants was not the type of evidence a judge should accept on the question of drinking, he refused to terminate the order for guardianship, opening the way for the adoption. The implication of McLellan Co.Ct.J.'s decision was that aboriginal persons could not be trusted in their evaluation of responsible drinking and therefore, he refused to accept any evidence of the parents' rehabilitation. Clearly, he felt a white home, with white middle-class parents was a more trustworthy home and environment for the child.

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<sup>856</sup> *GM* at para 7.

<sup>857</sup> *Ibid* at para 26.



In the case of *Re Cullen*, Andersen Co. Ct. J. dispensed with the consent of the natural mother for the adoption of her illegitimate child after finding that a 16 year old mother was not a fit mother for the child. The unwed mother gave her consent but had later revoked her consent. In a clear misapplication of the trilogy as handed down by the Supreme Court of Canada, Andersen Co.Ct.J. simply found that it would be better for the child's welfare to be with the adoptive parents. In an evaluation of custody similar to a private custody case, the judge weighed the two potential homes:

The natural parent in this case is a 16-year-old student who has no immediate prospects of marriage and no intentions of marriage at the moment. She is not keeping company with the natural father of the child....Counsel for the applicant indicated in his submission that there was no evidence of promiscuity of the part of the applicant, and I take it from that he meant sexual promiscuousness; however, it is difficult for me to see how this can be a fact when the applicant was having extra marital sexual relations which resulted in the birth of the child.<sup>858</sup>

The immature, sexually promiscuous mother was then contrasted with the proper upbringing the child would have with "two mature, responsible parents who have now, which was evident at the time of hearing, a great love and attachment to the baby they have had since it left the hospital at the time of birth. It is important that a male child have a father or male figure with whom he can relate."<sup>859</sup> Andersen Co. Ct. J. simply weighed what he saw to be in the child's welfare – to be in the care of two responsible adults, as opposed to one young, promiscuous young woman – and terminated the mother's right to the child.

Finally, *Re Sarty*, or *Re P.J.S.*, involved a child who was alleged to be in need of protection as he was in the charge of a person who, "by reason of misfortune" was unable to properly care for him. The mother had on several occasions placed the child with the CAS in moments of stress. She had on these occasions returned and taken the child when she felt herself capable of providing proper care. On one occasion, however, in a moment

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<sup>858</sup> *Cullen* at paras 22-24.

<sup>859</sup> *Re PJS*, at para 25.

of crisis, she placed the child with the CAS for the purpose of placing the child for adoption. In determining that the child should become a ward of the CAS the family court judge particularly relied upon evidence of the mother's emotional instability, even though expert evidence had indicated that the child was not harmed and had been well cared for by the mother. In particular, the family court judge made the following finding with regard to the doctor's evidence about the mother:

Her emotions he said, 'are not even', so really it makes some of the evidence stress more clearly to me that Mrs. K's ability can be questioned not only with regard to men but in choosing her friends generally and also in her dealings with the child.<sup>860</sup>

Furthermore, he noted that there was evidence that she had been "keeping company with at least six men" in six years.<sup>861</sup> In other words, despite evidence provided by the mother's doctor to the contrary, the family court judge chose to infer from evidence of the mother's emotional instability and her sexual promiscuity that she was a danger to the child. The mother did not fit the mold of the normal mother and as such, the judge directly inferred from this that the best interests of the child mandated that the child should be taken from her care. The family court decision in *Sarty* was overturned on appeal to the Supreme Court. The Supreme Court held that the family court judge had not made a proper finding that the child was in need of protection, but rather had decided the case purely on the basis of the welfare of the child. The Supreme Court was persuaded by the evidence of the doctor that, although the mother suffered from some emotional instability, she had always been able to properly care for the child.

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<sup>860</sup> *Ibid* at para 17.

<sup>861</sup> *Ibid* at para 10.

## Introduction of the *Children's Services Act*

In 1976, the *Children's Services Act*<sup>862</sup> (the "CSA") was introduced, which combined and replaced the *Child Welfare Act* and the *Adoption Act*.<sup>863</sup> The CSA carried over the definition of "child in need of protection" from the 1968 amendments. Furthermore, in keeping with a greater emphasis on the liberty rights of the parents, procedural protections were also being put into place in the new CSA. Time lines for proceedings after apprehension were introduced, as were time lines to allow for adjournments and the gathering of psychiatric evidence.<sup>864</sup> The Act provided that a hearing had to be held within 21 days of taking a child into care. The Act also mandated that judges provide written reasons for their decisions and that the reasons should be available to any party to the proceedings.<sup>865</sup> Overall, the Act was described as being less "authoritarian" and coercive and more focused on "counseling and persuasion."<sup>866</sup>

This might have been true in terms of providing for greater procedural protections and more emphasis and attention on the due process rights of those involved in the process. However, the definition of a "child in need of protection" still contained vague standards of "fitness" and a lack of direction as to what constituted the best interests of the child, allowing for value judgments of maternal inadequacy by judges deciding child welfare cases. Furthermore, the grounds for finding a child in need of protection continued to focus almost exclusively on the parent, and in many cases, the mother, with little regard

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<sup>862</sup> SNS 1976, c 8.

<sup>863</sup> RSNS 1967, c 31; 2.

<sup>864</sup> CSA, s 49.

<sup>865</sup> CSA, s 62(2).

<sup>866</sup> Nova Scotia, House of Assembly, Official Report of Debates (Hansard), (15 March 1976) at 1470 (Hon William MacEachern).

to the effect on the child. In particular, it is evident from the cases decided several years after the introduction of the Act that greater use was being made of psychiatric evidence to chronicle the elements of maternal deficit. The shift to using psychiatric evidence to predict maternal fitness – on an objective “scientific” standard as opposed to a subjective, value laden moralizing standard of fitness – is evident when we compare two early *Children’s Services Act* cases: *Maguire* and *Lake*.

*Maguire*, or *Children’s Aid Society of Colchester County v. B.M.*<sup>867</sup> was an early *Children’s Services Act* case that was appealed up to the Court of Appeal, where the decision of the family court judge finding the child to be in need of protection was overturned. The case involved a mother who was suffering anxiety and depression after the death of a husband, and then an uncle. Mrs. B had been hospitalized twice for psychiatric treatment for depression, anxiety and psychosis because of these two incidents. CAS became involved and apprehended the child after her partner reported to the Society that the mother – Mrs. B – kept knives under her pillow and was threatening to kill herself. The family court judge found the child to be in need of protection on the basis that the mother was unfit and would be unable to provide “the emotional stability required in the long run for the full development of the child.”<sup>868</sup> The family court judge had found that the child should not be returned to the parents as they were unfit due to the mother’s mental health problems and the father’s drinking problem. The order was made despite the fact that the “housekeeping standards in the living premises of the respondents were adequate, the baby appeared to be clean and there was no reason to be concerned about

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<sup>867</sup> (1979) NSR (2d) 1, 9 CPC 220 (CA).

<sup>868</sup> *Ibid* at para 16.

the general hygiene of the child or its nutrition.”<sup>869</sup> Nor was there any allegation that any harm had come to the child.

In the course of overturning decision of the family court judge, McLellan Co.Ct.J. criticized the judge for failing to give due weight to the evidence of a doctor who had examined Mrs. B and for “placing undue emphasis on the future aspect of the emotional instability which at one time affected the mother of the child”.<sup>870</sup> The evidence of the doctor – Dr. Griffin – was that while the mother “disorganizes far more than most people” under stress, her problems were being handed with medication. Further, when asked about her parenting skills, Dr. Griffin gave the following evidence:

I should mention that she behaved in an extremely motherly fashion. She did all the right things as far as I could tell. She soothed it when it was upset, took it up on her lap when necessary and all the things which were appropriate for a mother to do. Now that is the only time in my life I have ever observed her handling a child but I mention it for what it is worth.<sup>871</sup>

With regard to whether or not the doctor felt there was any reason why the mother and her partner should not have custody of the child, Dr. Griffin responded:

Yes, I think she would be unable to look after the child, of course, that’s true of anyone who is sick I suppose, they are unable to look after a child. When she was having these sick spells for which she went to the Nova Scotia Hospital, she would probably be unable to look after a child but at the present time I see no reason why she couldn’t look after a child.<sup>872</sup>

In overturning the decision of the family court judge, the appellate court held that there was no evidence that the child was in need of protection for the reason that she is “not properly cared for or suffering from any neglect at the present time.”<sup>873</sup> The County Court

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<sup>869</sup> *Ibid* at para 11.

<sup>870</sup> *Ibid* at para 16.

<sup>871</sup> *Ibid* at para 7.

<sup>872</sup> *Ibid*.

<sup>873</sup> *Ibid* at para 17.

judge found that looking to the future and the possibility that the mother may have another breakdown and be unable to provide for the child was not a proper basis on which to find a child in need of protection where the child's current needs were being met. Reiterating the reasoning of *Niedermayer Fam.Ct.J.* in the decision of *Nova Scotia (Minister of Social Services) v. JR*,<sup>874</sup> he held: "I cannot consider the future possible events but rather I must consider the present probable consequences with respect this child."<sup>875</sup> On further appeal, the Court of Appeal upheld the County Court decision.<sup>876</sup>

*Maguire*, and indeed, the Supreme Court judgment from *Sarty*, outlined above, affirmed that a mother's psychiatric challenges could not be the basis to find a child in need of protection where those challenges were currently being managed and there was no proof of harm to the child. The Court of Appeal took a sharp turn two years later in *Children's Aid Society of Halifax v. Lake*.<sup>877</sup> In this case, the Court of Appeal held that the focus of the *Children's Services Act* had changed from that under the *Child Welfare Act*. Now, the Court could consider the causes and effect of the dysfunctional family with psychiatric and psychological evidence and make a determination of the future fitness of the parent. Even, as in the case of *Lake*, where a parent was never able to take the child home from the hospital, psychiatric evidence as to parental fitness could serve to find a child to be in need of protection.

*Lake* involved an unwed, twenty-year-old mother whose baby was apprehended by CAS at the hospital following the child's birth. The baby was found to be in need of protection on the basis that the mother was unfit and therefore the baby's "life, health or

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<sup>874</sup> (1980) 44 NSR (2d) 493, NSJ No. 63.

<sup>875</sup> *Ibid* at para 20.

<sup>876</sup> *Ibid* at para 19.

<sup>877</sup> (1981), 45 NSR (2d) 361, 86 APR 361.

emotional welfare is endangered”.<sup>878</sup> The mother had been institutionalized several times and her diagnosis of behavioural disorder, and mixed neurotic and depressive traits did not improve with medication, according to her doctor. Lake was found by the court to “show a limited level of intellectual functioning combined with behavioural outbursts of verbal and at times physical aggression.”<sup>879</sup> Medical staff who attended to Lake while she was hospitalized for psychiatric help gave evidence that “this girl is totally unable and incompetent to assume the role of a responsible mother”.<sup>880</sup> In particular, her attending psychiatrist – Dr. Hingley, a psychiatry student in the early months of his residency at the IWK at the time – gave evidence at trial of her psychiatric disorders and their impact on her ability to mother. In particular, Hingley diagnosed Lake with “explosive behavior disorder combined with an aggressive personality disorder in the setting of mild retardation.”<sup>881</sup> He gave the following evidence which was relied upon by the family court judge and later the Court of Appeal:

- A. The capacity to parent without the possibility of child abuse, which is basically my concern, is a very difficult concept to deal with. The first thing that really has caused me considerable difficulty is the fact that there is very little published or very little that people or psychiatrists in general have known or pediatricians for that matter as to how to protect - which individuals will abuse their children. There's been lots published about what happens after a mother has had a child and what's the likelihood of the child being abused again, and this is where most of my difficulties came in trying to, for myself, come to a conclusion. I went and reviewed what I could find in the literature. Again I'm talking purely in terms of the predictive - reviewing the literature in terms of what facets can we find that would be predictive of child abuse in an individual before they've had their child. In other words, it's trying to find characteristics of the mother that you can document before she has the child. She has the tendency to abuse the child; and to do that was extremely difficult. It was the best part of an afternoon to try to find what people had said about this but the more recent literature that is coming out certainly tends to suggest a very clear

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<sup>878</sup> *Ibid* at para 1.

<sup>879</sup> *Ibid* at para 3.

<sup>880</sup> *Ibid*.

<sup>881</sup> *Ibid* at para 6.

characteristic picture of those individuals who they find will subsequently go on and abuse their children."

"Q. Now, Dr. Hingley, again perhaps you'd review the last paragraph of your letter of October 30th for the court?

A. That paragraph refers to the presentation of the case at departmental rounds and in which all of the medical staff attached to the unit or most of them were present, including two staff psychiatrists. The history to date was presented and it was the opinion of all those there at that time that this girl would be incompetent to assume the role of a responsible mother, and these statements were subjected to the clinic head; and he approved them as well as expressing his opinion and that of the clinic. Now, in addition, my own opinion is based on what is known about this. How do I make up my mind?" [emphasis added]

In Dr. Hingley's opinion there was a high likelihood for child abuse although there was no evidence that Lake had previously abused children. Dr. Hingley also stated that she was not psychotic. Dr. Hingley on cross-examination did not agree with previous opinions that the patient could be classed merely as a passive aggressive personality.<sup>882</sup>

It was evident from this expert evidence that the decision on capacity to parent was being made on the basis of Lake's diagnosis and information in her hospital file as opposed to actual observation of her behavior at home or with others. As the quote reproduced above indicates, Hingley was basing his hypothesis of "capacity to parent" on what "type of individual" was likely to abuse their children and whether Lake presented as that type of individual. His evidence that medical staff on rounds also came to the conclusion that she would be incompetent to parent, was based on their understanding of type of person Lake was – they saw her as a diagnosis, as opposed to a particular person with a particular ability to parent her particular child. Indeed, the psychiatrist called upon to confirm Hingley's expert opinion admitted that he had only seen her on one occasion in hospital. And yet, that psychiatrist, having only seen her once and based on knowledge of her

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<sup>882</sup> *Ibid* at para 6.



diagnosis held that her “great deal of anxiety and emotional unpredictability that this obviously can have adverse consequences for the baby.”<sup>883</sup>

Four social workers also gave evidence: three felt that Lake could not parent and one felt that she could. Evidence was also led that Lake had served as a babysitter in the past. However, it is obvious in the judicial reasoning, first at trial and then at the Court of Appeal, that the evidence of Hingley and his medical colleagues was the evidence valued in coming to a decision. The trial judge concluded that,

taking the preponderance of the evidence as a whole and considering the expert testimony and considering the testimony of the mother, herself, and my own observation of her demeanor, I would say that in many respects the mother shows a high degree of immaturity at the very least; in my view of that, I don't think it would be prudent for the court to allow the child to go back to the mother on any condition.<sup>884</sup>

The Court of Appeal was careful to review the changes that were brought about by the *Children's Services Act* definition of child in need of protection. The Court noted that while poverty and circumstance had been the fundamental problems with which the *Child Welfare Act* was concerned, the *Children's Services Act* recognized that expert knowledge on “troubled families” and the cause and effect of “family disruption” would now become the focus of child protection law and practice.<sup>885</sup> The Court held, however, that only when the child could be shown by the Agency to be in need of protection could the court then go on to make a determination in the best interests of the child.<sup>886</sup>

The Court was also careful to distinguish the case at hand from *Maguire*. Contrary to the finding in *Maguire*, *Lake* was premised on using psychiatric evidence to prove a

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<sup>883</sup> *Ibid* at para 8.

<sup>884</sup> *Ibid*.

<sup>885</sup> *Ibid* at para 18.

<sup>886</sup> *Ibid* at para 21.

mother's future incapacity to parent her child. The Court held that "What evidence is relevant will depend on the issues raised in each particular case. By the same token evidence of future conduct may be adduced on behalf of a parent where it is relevant."<sup>887</sup> Having just found that the *Children's Services Act* was premised on the concept of a child being in need of protection where psychiatric and psychological evidence could show cause and effect of "family disruption", the Court was essentially holding that the potential for future risk evidenced by psychiatric and psychological opinion could in every case find a child in need of protection. The Court held:

In my view, evidence is not restricted under the Act solely to the past conduct of circumstances relating to the parent and the child. In many cases it is what those circumstances and conduct may lead to that the need for protection arises. Where it is relevant to the issues, then by its very nature expert opinion, particularly of psychiatrists and social workers, is relevant and admissible in determining those issues. Certainly the definition clauses defining a child in need of protection are prospective in their reach.<sup>888</sup>

In the jurisprudence following *Lake*, there is a noticeable shift to the use psychiatric and psychological evidence to establish maternal unfitness and therefore, the child's need for protection. As Judge Daley explained in the following paragraph from *Nova Scotia (Minister of Social Services) v. L.M.C.*,<sup>889</sup> "The child is not the focus of this application [to find the child in need of protection]. Section 2(m)(iii) of the Act focuses on the person who is caring for the child and that person's fitness, ability or willingness to properly care for the child."<sup>890</sup> Therefore, in *L.M.C.*, while the psychiatric and medical evidence showed the child to be "normal on each visit and was clean with no signs of abuse"<sup>891</sup> and

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<sup>887</sup> *Ibid.*

<sup>888</sup> *Ibid* at para 22.

<sup>889</sup> (1982), 53 NSR (2d) 7, NSJ No. 87.

<sup>890</sup> *Ibid* at para 59.

<sup>891</sup> *Ibid* at para 4.

“appropriately developed for her age and seemed to interact and socialize well... nothing abusive or neglectful with the child itself,”<sup>892</sup> of concern to medical experts was the mother’s abnormality and fitness to parent as determined by the psychiatric evidence. The evidence of the psychiatrist found a number of indications of “maternal inadequacy” such as the following:

The mother was generally unkempt in personal appearance. Dr. Butters stated that the mother had a marked degree of maternal inadequacy evidenced by her avoidance of eye contact with the child, the way she carried the child, "like a log", few apparent mothering instincts and an apparent lack of concern for the child. He believed the mother fulfilled the basic mothering duties, i.e. keeping the child clean and fed, but she did not provide the other emotional and bonding needs. She is not overtly psychotic but is very immature. The doctor also stated that symptoms of maternal deprivation would not show up in the child until it was approximately six months old. He was guarded in prognosticating stating that the mother may be able to properly care for the child if she had social service aids and support and if she had good motivation.

Some of the mother's behaviour, Dr. Butters noted, included inappropriate laughter, a flat affect (did not appear to have any genuine emotion), a lack of expression and emotion, a simplistic approach to mothering, no questioning about the child's development and vague responses to questions.<sup>893</sup>

Similarly, a pediatrician who saw the mother also found her to be abnormal and inappropriate:

Dr. Goldbloom did, however, find that the mother was of concern. She was careless in handling the child. He believes she lacks awareness of how a baby should be handled and cared for. He described the mother's inappropriate behaviour including giggling and her lack of attention. He describes her stability as being abnormal.

Dr. Goldbloom describes the baby as being, in his words, at exceedingly high risk and the possibilities limited. He is concerned, for example, that the mother insists she loves the child, that she can look after the child herself and does not need anyone's help. He noted that the absence of signs of neglect is not unusual in a child of this age.<sup>894</sup>

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<sup>892</sup> *Ibid* at para 6.

<sup>893</sup> *Ibid* at paras 4-6.

<sup>894</sup> *Ibid*.

It is obvious from Daley Fam. Ct. J.'s decision that he was highly influenced by this medical evidence. In finding the child to be in need of protection he noted that, while the child was currently normal and there were not yet any signs of abuse or neglect, Daley Fam.Ct.J. was “mindful of the medical evidence which raised the possibility of the symptoms of parental deprivation manifesting themselves six months or more after birth”.<sup>895</sup> In reiterating the evidence he found to be persuasive in finding the child in need of protection Daley Fam.Ct.J. legitimized this evidence as sufficient for finding that the child will inevitably be in need of protection in the future:

I find that the mother has little regard for her personal appearance and physical condition. I find that she exhibits maternal inadequacy in her contacts and relationship with her child. For example, she has a simplistic approach to mothering believing food, clothing and shelter are sufficient; she is careless in caring for the child; eye contact and carrying are inappropriate; she lacks concern for the child; does not respond consistently to offers to help her, which I believe have been herculean, and refuses to recognize need for help. I find she is immature and appears to be of low intelligence. She is generally unemotional, is inappropriate in her behaviour and lacks expression. She is naive and lacking in normal interpersonal, child caring and communication skills. She is forgetful and has a short attention span. Her actions and reactions in court support the evidence of the Minister in this regard.<sup>896</sup>

This psychiatric record of maternal deficiency was used to predict and prove that the child was in need of protection. Even though no harm or even substantial risk of harm to the child was shown, the ability of the psychiatric and medical evidence to diagnose maternal abnormality was enough to form a basis for finding the child in need of protection.

The record of cases decided under the *Children's Services Act* in the 1980s shows that the language of child protection jurisprudence had become highly medicalized. The decisions of judges were starting to mirror the language of psychiatrists and doctors as the decisions of specialist Juvenile court judges had mirrored the psychiatrists and doctors of Nova Scotia's system of institutions. With this mirroring, judicial decision making was

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<sup>895</sup> *Ibid* at para 58.

<sup>896</sup> *Ibid* at para 60.

legitimizing the medical and psychiatric knowledge and its ability to effectively predict one's fitness to parent. Each finding of maternal unfitness necessitated the judge reiterating, in his own words, why he found the mother to be inadequate, thereby naturalizing a connection between maternal "abnormality" and fitness to parent. By the 1980s, these findings were largely couched in medical language. For example, in this finding of unfitness by Niedermayer Fam.Ct.J., in 1983<sup>897</sup> it is still clear that while he uses a language of medical/psychiatric knowledge he is very much relying upon a moralizing discourse:

My opinion of Ms. F. is that she is a self-centered, hedonistic, frustrated, demanding, uneducated and uneducable individual who has a low level of comprehension, tolerance and aptitude in dealing with interpersonal relationships. Her lack of personal medical care and social acumen presents a medically and emotionally unstable individual. Her unwillingness to minimally respond to the requests and advice directed to her by various agencies and professions indicate, to me, a deep and disturbing flaw in her character.<sup>898</sup>

Basing child protection finding decisions on medical and psychiatric evaluations of maternal abnormality, without focusing on the effect that this abnormality had on the child, confirmed that a medical or psychiatric diagnosis was capable of depriving a mother of her child. Given that the parents involved in the child welfare system have for the most part been marginalized by classed, raced, gendered and ableist systems of inequality it is likely that they will be found to deviate from standards of "normalcy". An emphasis on psychiatric evaluations of abnormality rather than assessments of actual child functioning also risked depriving a child of his or her parent without a careful consideration of just how that parent's deficiencies actually affected the child.

In the next chapter I will detail how, in response to this normalizing and moralizing discourse of maternal fitness, children's rights advocates began to argue for a more rights-

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<sup>897</sup> *Children's Aid Society of Halifax v LF*, [1983] NSJ No 134.

<sup>898</sup> *Ibid* at para 129.

oriented “least intrusive intervention” model of child protection. Family autonomy for marginalized families, they argued, required seeing the limits of psychiatric evidence to predict the future adjustment of children, and preventing judges from imposing largely white, middle-class standards on families in poverty.<sup>899</sup> These reformers argued that assessing the capacity to parent was a notoriously fraught exercise, subject to value judgments and faulty assumptions about the future functioning of children. As such, they argued that it had to be recognized that presumptively, the interests of the child were best provided for in the home and only once it could be shown that parental conduct was harming the child or placing the child at substantial risk of harm, should the child be removed. In sum, they argued that the focus of child protection adjudication had to shift from a detailing of maternal inadequacy to an analysis of the needs of the child and the capacity of the state to meet these needs.<sup>900</sup>

## **Conclusion**

In chapter 4 we see that by the mid-50s there was generally a process of “familialization”, even for mother-headed families and families in poverty taking place in child welfare, social assistance, and child development quarters. The heyday of institutionalization eventually came to an end in Nova Scotia and mothers’ allowances were provided to most mother-headed families in order to allow these families to keep their children at home. Child development knowledge was warning about the dangers of institutionalization and the importance of maternal attachment. In this way, the social assistance, and child development fields were serving to disconnect family autonomy from a family’s ability to be economically self-sufficient. Families could remain together even if

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<sup>899</sup> See Wald, *infra* 935; Mnookin, *infra*, note 927.

<sup>900</sup> *Ibid.*

they required public support. As long as the family was capable of providing for relationships with the child to promote normal child development, both psychiatric and child welfare quarters were willing to promote family autonomy, and importantly, the family autonomy of mother-headed families.

But not all mother-headed families would be accorded public support in terms of access to public assistance. While mothers' allowances were introduced in Nova Scotia in the 1930s, only certain types of mother-headed families were accorded support. Only certain mother-headed families, and only then, those that satisfied investigators they were fit and proper mothers, would receive mothers' allowances. Furthermore, both immigrant and aboriginal mothers were totally precluded from the scheme of mothers' allowances, regardless of family status or fitness. Child welfare authorities armed with professional expertise and knowledge of child development and family casework became an important source for not only providing services to mother-headed families in need of support, but of determining their eligibility of certain mother-headed or functionally mother-headed families to these services. While social assistance had long been predicated in this province on determining between the "deserving" and "undeserving", child welfare work was capable of bringing these moralized determinations in line with more scientific notions of normal child development and notions of proper motherhood.

There was one Canadian-born, non-Aboriginal mother-headed family in particular, however, whose moral and psychological fitness was presumptively suspect: the unwed mother-headed family. In social assistance and child development quarters in the post-war era, the unwed mother came under immediate suspicion for her sexual promiscuity in having sex before marriage and a child out of wedlock. As Suzanne Morton's work has shown, unwed mothers were actively encouraged by the CAS to give up their children for

adoption<sup>901</sup> and they were denied eligibility to mothers' allowances until 1966. Psychiatric and child development knowledge on attachment and deprivation constructed unwed mothers as unable to adequately provide for normal child development. While a male-head was no longer necessary in order to secure a sphere of privacy for the mother-headed family, the absence of a male head in raising the child rendered the lone mother an object of suspicion. For the unwed mother, her sexually promiscuous status served to validate the suspicions of social assistance, CAS and child development professionals.

But unwed mothers did not simply capitulate to the social and economic constraints to child-raising imposed on them and the demands of child welfare workers to give their children up for adoption. Beginning in the 1950s there was a proliferation of cases involving unwed mothers initiating legal action in order to rescind their consent to adoption. The Supreme Court jurisprudence on natural parental rights developed in opposition to received psychiatric knowledge about the deficiency of unwed mothers in child development and child welfare quarters. The natural parental rights jurisprudence shows judges contextualizing the positions of unwed mothers and the social and economic constraints that led them to agree to the adoption in the first place. Even where judges determined that the potential adoptive parents were wealthier or better suited in life to care for the child, the rights of unwed mothers to custody of their children were affirmed.

Processes of familialization in general in this era required a more contextualized notion of family autonomy than had been utilized by the courts in the institutional era of child protection. Up until this time family autonomy was conceived of in terms of an aggregate of individual privacy rights. Before an articulation of natural parental rights, the liberal rights jurisprudence challenging juvenile court decisions was able only to articulate

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<sup>901</sup> Morton, "Nova Scotia and Its Unmarried Mothers", *supra* note 571. As discussed above, this position of the CAS may not have applied to African Nova Scotian unwed mothers, in part, because of the lesser likelihood of finding an adoptive home for non-white children.



due process rights or the dismissing of applications for care. Now, by developing a notion of *family* as opposed to *individual* liberty, the superior courts, and eventually family courts, were able to challenge the determinations of psychiatrists and human service professionals by articulating their own normative concept of the family as a fundamental social unit of society. In this way, the family's right to stay together and self-determine took precedence over determinations of normalcy or fitness. Unlike the determinations of child development and CAS professionals, judges were asserting that unwed mothers could not be presumed to be unable to care for their children such as to presumptively justify state intrusion into their families. In this sense, we see that the concept of natural parental rights evidenced the responsive side of law – responding to the rights challenges of unwed mothers and their demands for a presumption of the right to self-determine despite the social stigma against them.

The concept of natural parental rights was an important and ultimately, productive legal category. The concept was capable of asserting the rights of marginalized families and of insisting on a testing of normalizing and moralizing determinations of the presumptive need for state intervention into these families. But it was also a flexible legal concept capable, in turn, of accommodating both a moralizing and normalizing regulation of unwed mothers. Once a notion of family autonomy predicated on “natural rights” was articulated, the whole of the “private sphere” of the family came under scrutiny in public custody determinations. As we saw in the Supreme Court jurisprudence, while judges were able to articulate a sphere of liberty for unwed mothers and families in poverty, the concept was also capable of assimilating these natural rights with notions of white, upright, industriousness, reproducing wider value judgments about the wrong “type” of mothers.

The concept of “child in need of protection” likewise shifted the focus of child welfare determinations away from the child and away from the moralizing evaluations of the philanthropic and child delinquency eras, ie., determinations predicated on “idleness”

and “dissolute” lifestyles, and onto parental conduct. Once this happened, the behaviour of the mother and in particular, the unwed mother, come under direct legal scrutiny. While her status as an unwed mother would no longer find her presumptively unfit, should she display abnormal maternal behaviour she would be found to be unfit. Family autonomy in the child welfare context became contingent on normal maternal conduct and in particular, the mother’s ability to provide for normal child development. Both moralizing and normalizing judgments about maternal “fitness” served to reproduce the raced, gendered, ableist and classed value judgments from previous eras.

In the 1980s we begin to see greater use of psychiatric evidence of maternal pathology relied upon in the jurisprudence. As Dr. Hingley states in the quote above from *Lake*:

The first thing that really has caused me considerable difficulty is the fact that there is very little published or very little that people or psychiatrists in general have known or pediatricians for that matter as to how to protect - which individuals will abuse their children.<sup>902</sup>

In turn, by failing to scrutinize the ability of psychiatric and medical determinations to predict what type of individuals will go on to abuse their children, child protection law affirmed the predictions made by psychiatrists about the type of women that would go on to abuse their children. As Golder and Fitzpatrick have put it, they affirm that these knowledge claims made by disciplinary power are “in the nature of things”, or in other words, are just simply claims to truth.<sup>903</sup> In the next chapter I will discuss what the consequences have been for mothers once the jurisprudence affirmed that psychiatric determinations could accurately predict which women would abuse their children. In other words, which women posed legitimate “risks” to their children justifying subjecting them to state surveillance, and possibly state removal of the child from the home. In the next

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<sup>902</sup> *Lake*, *supra* note 877.

<sup>903</sup> Golder and Fitzpatrick, *supra* note 109 at 66.

chapter I will show that the same families that did not fit the “natural” or morally proper ideal still continue to be over-represented in the child protection system: that is, families that do not fit the industrious, white, male-headed and sexually appropriate ideal.

## Chapter 5:

### 1980s to Present: Risk & Responsibility in Child Protection Jurisprudence

The idea of child abuse is not thereby idiosyncratic. In only one respect is it rare. We live with and through a welter of conceptions that are at once moral, human, social and personal, but there are, at any time, few fundamental concepts that we can watch being made and molded before our very eyes. Many of our ideas have histories similar to that of child abuse, but they are lost to conscious memory – just as the traces of the evolution of the idea of child abuse are in most places being erased at this very moment. But there are differences among thick moral concepts. Child abuse is an instance of a special class. It is a normalizing concept.<sup>904</sup>

In the 1970s, two strong critiques emerged of the child protection system in Anglo-American countries; one from the psychiatric, and one from the legal community. In particular, the psychiatric community argued that the discourse of parental rights in child placement decisions had sacrificed the needs of the child to these parental rights. They argued for a child protection system focused wholly on the needs of the child regardless of parental claims to privacy. In contrast, a rights-based critique emerged from the legal community that argued that the protection of family autonomy was in the best interests of children as it prevented unwarranted, traumatic interventions by the state in largely marginalized families. In the end, as I will show, these two seemingly disparate views converged on the need to provide for family autonomy in the best interests of the child. Both psychiatric and legal reformers argued that before the state could intrude into the private sphere of the family to remove the child, there had to be a testing of the need for intervention. They argued for an insistence on grounds for intervention tied to objective harms or substantial likelihood of harms to children and a frank look at the effects of, and end result of intervention: ie., removal of the children from a home, and into state care. They argued for the provision of services to help families in poverty so that decisions to

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<sup>904</sup> Ian Hacking, “The Making and Molding of Child Abuse” (Winter 1991) 17 *Critical Inquiry* 253-288.

remove the child were not predicated on a family's impecunious state. And above all, they argued for the needs of the child in need of protective services to always be at the forefront of consideration.

In this chapter I will review the model of child welfare reform that emerged in the 1970s: the least intrusive intervention model of child protection. This model of child protection was introduced in Nova Scotia in 1991 with the coming into force of the *Children and Family Services Act* (the "CFSA").<sup>905</sup> While the Act was meant to test potentially coercive interventions of the state into the private sphere of the family, I will argue that changes in funding for social services and changes to the nature of social work itself have served to undermine some of the more robust protections envisioned by the CFSA.

Since the 1980s, social policy theorists have noted a return of child welfare to a residual model of services. Much like the era in which the *Prevention and Punishment of Wrongs to Children Act* was passed, we are seeing a renewed emphasis on family responsibility to address poverty without substantive state support for the family. Furthermore, much like this early era of child protection work, support for the poor is focused on distinguishing between the "deserving" and the "undeserving poor" with the "undeserving poor" singled out for especially punitive and repressive intervention. As in the era of the *Prevention and Punishment of Wrongs to Children Act*, children are understood as the members of the family that are deserving of state support while parents in poverty are depicted as deviant, dependent and responsible for their marginalized positions. Unlike child protection law and practice in the era in which the *Prevention and Punishment of Wrongs to Children Act* was passed, however, the harms to children which justify intervention and removal (where the judge determines this to be in the welfare) of the child are not harms which are familiar from criminal law, vagrancy law and poor law

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<sup>905</sup> SNS 1990, c 5.

contexts, but from the psychiatric and child development contexts. Today, the way that harms to children are evaluated and adjudicated upon are predicated largely upon psychiatric and psychological determinations of harms and risks of harm to children.

Like social policy theorists, child protection scholars have argued that child protection services have likewise seen a scaling back of government resources for child protection services and further, that this change in funding has had an appreciable effect on the way that child protection services are carried out in Canada.<sup>906</sup> For example, observers argue that social service work with children has become more administrative, with front line workers often having minimal contact with families.<sup>907</sup> Instead, decisions for Agency intervention and child placement decisions are premised on standardized tests of risk assessment and parenting capacity assessments which test a parent's future likelihood of neglecting or abusing the child.<sup>908</sup> As a result, by the time an application gets to trial, a myriad of evidence, including expert evidence, has been compiled detailing parental risk and parental deficit. However, as critical social work theorists have argued, much like moralized determinations of "fitness" from earlier years, risk assessments hide value judgments based on class, race, gender and family status. As a result, racialized families<sup>909</sup> and mother-headed families<sup>910</sup> continue to be overrepresented in the child

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<sup>906</sup> Karen Swift and Marilyn Callahan, *At Risk: Social Justice in Child Welfare and Other Human Services* (Toronto: University of Toronto Press, 2009).

<sup>907</sup> Nigel Parton, "Challenges to Practice and Knowledge in Child Welfare Work: From the 'Social' to the 'Informational'?" (2009) *Child and Youth Services R* 715; Carol Curtis, "The Limits of Parenting Capacity Assessments in Child Protection Cases" (2009) 28 *CFLQ* 1; *ibid.*

<sup>908</sup> Swift and Callahan, *ibid.*

<sup>909</sup> Cindy Blackstock, *When Everything Matters: Comparing the Experiences of First Nations and non-Aboriginal Children removed from their Families in Nova Scotia from 2003 to 2005* (PhD Thesis, University of Toronto, Factor Inwentash School of Social Work, 2009) [unpublished]. Blackstock found that First Nations children were removed from parental care 3.4 to 6 times more often than non-Aboriginal children in Nova Scotia between 2003 to 2005: at 194.

<sup>910</sup> Canada, Nico Trocmé et al, *Canadian Incidence Study of Reported Child Abuse and Neglect – 2008* (National Clearinghouse on Family Violence, Public Health Agency of Canada, 2010).

protection system in Nova Scotia. Furthermore, a lack of material supports for these families has resulted in socio-economically marginalized families experiencing a more coercive, rather than a supportive intervention on behalf of child protection services.<sup>911</sup>

In this Chapter I will argue that rather than challenging these trends, the jurisprudence interpreting the CFSA has reinforced this shift in child protection services. First, I will argue that decisions testing the need for state intervention have become more focused on risk of harm to children; in particular, the grounds of neglect, emotional harm and exposure to domestic violence have become common grounds for intervention. These grounds are particularly amenable to risk assessment tools and expert evidence which base the probability of harm on observations of parental behavior and evaluations of parental deficit. As a result, protection stage findings become heavily focused on parental deficits and not on proving harm to the child. Furthermore, these risks are particularly prominent in families suffering socio-economic marginalization and yet, as critics of risk assessment tools note, the professional evidence used to evaluate the presence of these risks do not assess structural or environmental risks to the child. A focus on risk serves not only to obscure the effects of socio-economic marginalization on parents and children, but it serves to reinforce the idea that it is the behavior of parents alone that creates this situation of socio-economic marginalization. Furthermore, parental behavior and not social and economic inequality, are constructed as the real source of risk to children. Rather than providing for a stringent testing of the need for state intervention this focus on parental deficit constructs state intervention into the family as presumptively beneficial to children.

In this chapter I argue that child protection jurisprudence interpreting services and time lines under the Act further reinforces the notion that risks to children are the result of parental deficit only, and not the result of coercive state intervention or socio-economic

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<sup>911</sup> Nova Scotia, Minister's Advisory Committee on Children and Family Services Act and Adoption Information Act, *Report* (Halifax: Nova Scotia Community Services, May 2008) at 12-15.

risk. In the decisions interpreting the proper scope of services and the proper application of time lines, judicial decision-making has interpreted state responsibility strictly, mandating a strict adherence to the time lines, and justifying the provision of “soft”<sup>912</sup> services in the form of supervision, parenting education and capacity assessment services. The provision of these services on a time-limited basis, as opposed to material supports for families, both informs and is informed by the construction of “risky” parental behavior, and not socio-economic marginalization, as the real source of risk to their children. Counter to the child-centered reforms that were meant to usher in a “least intrusive intervention” model of child protection, a focus on risk and parental conduct has served to undermine a rigorous testing of both the need for, and the character of, state intervention on behalf of children in marginalized families.

### **A Child-Centered System of Child Welfare**

The era of “familialization” of the 1950s and 60s that emerged amidst of a critique of institutionalization saw the Supreme Court of Canada insisting on a more rigorous testing of the need for coercive state intervention into marginalized families. As opposed to presuming the need to intervene in and remove children from unwed-mother-headed families and other families in poverty, the Supreme Court affirmed at law the presumption

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<sup>912</sup> See for example, Michael Wald, “State Intervention on Behalf of “Neglected” Children: A Search for Realistic Standards” (1974-1975) 27 Stan L R 985 at 997-998:

The effectiveness of other types of intervention is even more questionable. Social work agencies generally provide two types of services: “hard” services, such as homemakers, financial aid, and medical care; and “soft” services, such as individual and group counseling or parent education programs. In most jurisdictions “soft” services are in considerably greater supply than “hard” services.” Despite approximately 70 years of experience, there is remarkably little evidence demonstrating the usefulness of social work intervention, particularly with regard to “soft” services. While there are numerous claims of success in individual cases, the little existing hard data tend to indicate that providing such services, at least to unwilling clients, is not very helpful.



that the best interests of the child were provided for in the home with the child's natural parents.<sup>913</sup> The jurisprudence of natural parental rights ultimately served to focus a great deal of legal scrutiny on parental, and most often, maternal behavior. However, it also served to challenge determinations made by judges, child welfare services and even child development specialists which saw unwed mothers as presumptively unable to provide for the best interests of the child. The Supreme Court of Canada trilogy, then, can be understood as an affirmation of the presumption of family autonomy in "public", as opposed to private custody cases.

In 1973, shortly after this jurisprudence of parental rights, child development expert Anna Freud, with the help of Albert Solnit of the Child Study Center at Yale University and Joseph Goldstein of Yale Law School, published a psychoanalytic critique of the best interests of the child standard.<sup>914</sup> They argued that the best interests standard in child placement decisions had sacrificed children's needs to parents' rights.<sup>915</sup> Instead of focusing on parental rights, they argued, more attention had to be paid to the needs of the child. They argued that the best interests of the child standard had to have a renewed focus on child wellbeing, which could be provided by psychoanalytic insights on child development.<sup>916</sup> Freud, Goldstein and Solnit argued for standards in child placement decisions based upon "the least detrimental available alternative for safeguarding the child's growth and development" drawing upon several principles of child development

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<sup>913</sup> *Martin v Duffell*, [1950] SCR 737, 4 DLR 1; *Hepton v Maat*, [1957] SCR 606; and *Agar v McNeilly*, [1958] SCR 52.

<sup>914</sup> Joseph Goldstein, Anna Freud and Albert Solnit, *Beyond the Best Interests of the Child* (New York: The Free Press, 1973).

<sup>915</sup> *Ibid* at 6.

<sup>916</sup> *Ibid* at 7.

garnered from psychoanalytic insights.<sup>917</sup> The least detrimental alternative principle to child placement had three components:

1. Placement decisions should safeguard the child's need for continuity of relationships;
2. Placement decisions should reflect the child's not the adult's sense of time; and
3. Child placement decisions must take into account the law's incapacity to supervise interpersonal relationships and the limits of knowledge to make long-range predictions.

These guidelines were premised on the idea that child development theory and in particular, attachment theory,<sup>918</sup> should guide placement decisions. Furthermore, child development knowledge provided that a child's sense of time was different than an adult's in that potentially very short periods of time could have fundamental effects on a child's growth, development and attachments with a "psychological" rather than a "natural parent". These two principles essentially formed the core of the "least detrimental alternative." The third guiding principle provided that child placement decisions had to rely on the first two principles as they were the only guidelines that one could be sure about. If the law attempted to impose other conditions on the child's care that did not accord with these principles, the law was in danger of introducing greater uncertainty into the life of the child. The authors explained:

The law, then, ought to and generally does prefer the private ordering of interpersonal relationships over state intrusions on them.

Yet the law does intrude. When it does, it becomes important for decisionmakers to be guided by an understanding of the limitations not only of the legal process but also of the predictive value of the knowledge on which its judgments can be based. ...As the continuity and the child's-sense-of-time guidelines suggest, placement decisions can be based on certain generally applicable predictions. We can, for example, identify who, among presently available adults, is or has the capacity to become a psychological parent and thus will enable a child to feel wanted....Further,

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<sup>917</sup> *Ibid* at 53.

<sup>918</sup> That is, that children form psychological bonds with adults and these bonds are necessary for normal development.

we can predict that the younger the child and the more extended the period of uncertainty or separation, the more detrimental it will be to the child's well-being and the more urgent it becomes even without perfect knowledge to place the child permanently. Beyond these, our capacity to predict is limited....Thus, the law will not act in the child's interests but merely add to the uncertainties if it tries to do the impossible – guess the future and impose on the custodian special conditions for the child's care.<sup>919</sup> [emphasis added]

Freud, Goldstein, and Solnit's guidelines for making child placement decisions became highly influential in child welfare practice.<sup>920</sup> But their initial prioritizing of "psychological" over "natural" ties also served as an argument to expand state intervention into families on the basis of securing the psychological well-being of the child.<sup>921</sup> Counter to the Supreme Court trilogy, in *Beyond the Best Interests of the Child*, Freud, Goldstein and Solnit argued that in cases in which mothers were revoking their consent to adoption, the court should be inquiring into which home would better provide for the psychological well-being of the child, and not the rights of the mother.<sup>922</sup>

While Freud, Goldstein and Solnit's original thesis set out in the *Beyond the Best Interests of the Child* was able to articulate a psychoanalytic concept of the best interests of the child which provided a child-focused, and psychological basis of child placement decisions, they failed to address the Supreme Court of Canada's concern in the parental rights trilogy. In particular, in taking for granted that "the law does intrude" the authors failed to first answer the question: why does the law intrude on family autonomy? Two experts in child welfare law – Michael Wald and Robert Mnookin – responded vociferously

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<sup>919</sup> *Ibid* at 51-52.

<sup>920</sup> Nadine Taub, "Assessing the Impact of Goldstein, Freud, and Solnit's Proposals: An Introductory Overview" (1983) 12 NYU R L & Soc Change 485.

<sup>921</sup> See Michael Wald, "Thinking about Public Policy toward Abuse and Neglect of Children: A Review of *Before the Best Interests of the Child*" (1979-1980) 78 Mich LR 645 at 646.

<sup>922</sup> *Beyond the Best Interests of the Child*, *supra* note 914 at 78-79.

to Freud, Goldstein and Solnit, arguing that they failed to fully account for the complexities involved in the state intervention occasioned by child welfare systems. In particular, they argued that an “understanding of the limitations not only of the legal process but also of the predictive value of the knowledge on which its judgments can be based”<sup>923</sup> spoke in favour of a presumption of family autonomy, not state scrutiny.

Robert Mnookin, for example, agreed that the best interests of the child principle was indeterminate and required greater certainty in application, but ultimately disagreed with the thesis in *Beyond* as to how to address this indeterminacy. Mnookin argued that the best interests test that guided child placement decision was indeterminate first, because “[f]or most custody cases, existing psychological theories simply do not yield confident predictions of the [long-term] effects of alternative custody dispositions.”<sup>924</sup> Second, he argued that “even if accurate predictions were possible in more cases, our society today lacks any clear-cut consensus about the values to be used in determining what is ‘best’ or ‘least detrimental’” in terms of child protection interventions.<sup>925</sup>

Furthermore, he argued that different functions undertaken in the private and public child custody arenas justified establishing different best interest tests for these arenas. While Freud, Goldstein and Solnit may provide helpful guidelines for private custody decisions or for public custody decisions once neglect or abuse has been established, Mnookin argued that they failed to account for the need for the state to justify the initial intervention into the family. He provided the following explanation of the distinction between the public and private functions of child custody adjudication:

An important distinction between the two functions is their relation to the distribution of power between the family and the state. Legal standards for private

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<sup>923</sup> *Ibid* at 51-52.

<sup>924</sup> Robert H Mnookin, “Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy” (1975) 39 L & Cont Prob 226.

<sup>925</sup> *Ibid*.

dispute settlement guide judicial resolution of a private controversy. In this instance, authoritative resolution does not in itself expand the state's role with regard to child rearing. Legal standards for the child-protection function, on the other hand, act both to define when government may intrude into the family and to control child rearing through coercion. Defining the appropriate scope of the child-protection function is therefore necessarily related to profound questions of political and moral philosophy concerning the proper relationship of children to their family, and the family to the state.<sup>926</sup>

He argued that an indeterminate best interests standard in the context of public custody decisions could “in fact [be] used to shelter from explicit analysis other (often inappropriate) considerations” by judges.<sup>927</sup> A vague best interests standard he argued: “is inconsistent with the proper allocation of responsibility between the family and the state”<sup>928</sup>; it “allows a court to evaluate parental attitudes and behaviour on the basis of the judge’s personal values”<sup>929</sup>; it increased the potential for courts underestimating the risks of removal<sup>930</sup>; and it failed “to require judicial evaluation of alternatives to removal”<sup>931</sup>.

In the face of such indeterminacy, Mnookin laid out the framework for a child protection system that was premised on family autonomy characterized as a starting point that “assumes that power and responsibility for children generally ought to be vested in private hands - essentially the family except in cases where government rule can be justified.”<sup>932</sup> He advocated for a two-part principle of reform that would both limit the number of children entering foster care and assure that the child’s sense of time was

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<sup>926</sup> *Ibid* at 265.

<sup>927</sup> *Ibid* at 293.

<sup>928</sup> *Ibid* at 268.

<sup>929</sup> *Ibid* at 269.

<sup>930</sup> *Ibid* at 270.

<sup>931</sup> *Ibid* at 272.

<sup>932</sup> *Ibid* at 266.

respected by moving them through foster care more quickly. His principle argued for a more determine standard of removal and the curtailing of judicial discretion with the following standard:

A state may remove a child from parental custody without parental consent only if the state first proves: (a) there is an immediate and substantial danger to the child's health; and (b) there are no reasonable means acceptable to the parents by which the state can protect the child's health without removing the child from parental custody.<sup>933</sup>

Because families involved in the child protection system are often marginalized, he argued that determinate standards that both hold the social welfare bureaucracy accountable and that curb judicial biases would create more fairness in the process for these families. Mnookin argued for ensuring a testing of the need and quality of state intervention in the family is integral to the best interests of the child. Without respecting family autonomy we could be making manifestly unjust decisions by removing children from poorer homes to wealthier homes, for example; we could be allowing judges to substitute their values for those of the family of the child in such a way that makes moralizing judgments of those families; and we could be underestimating the risks of removal.<sup>934</sup>

Like Mnookin, Michael Wald insisted that state intervention should only be justified on the basis of evidence of objective harm to the child, and not on an evaluation of the type of parent before the court. Likewise, he argued in favour of family autonomy in the face of the indeterminacy of evaluations to effect the best interests of the child. Fundamentally, Wald questioned the efficacy and the fairness of basing decisions to intervene on judgments as to the proper way to parent or predictions as to the best way to produce a

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<sup>933</sup> *Ibid* at 278.

<sup>934</sup> *Ibid* at 282-283.

“healthy adult”. For example, he pointed to longitudinal studies of child development which showed that psychologists were unable to predict future behaviour from child rearing practices in two-thirds of cases.<sup>935</sup>

Therefore, like Mnookin, Wald began his argument for a child protection system based on the principle of family autonomy by fundamentally questioning the value of state intervention in cases of neglect. In doing so, Wald pointed to the psychological damage that could arise from apprehending a child: “damage more serious than the harm intervention is supposed to prevent”.<sup>936</sup> Further, Wald warned that child protection authorities could not ensure in every case that a child would be placed in a home superior to his or her own. Therefore, Wald argued that legal proceedings around child protection had to weigh the risks of removal against the objective harms that were present in the home, in determining whether state intervention was warranted.

In Wald’s formulation of the least intrusive intervention, strictly defining harms from which we as a society wish to protect children, helps to ensure not only that decisions were not reproducing cultural biases but that the harm caused by the intervention would be more beneficial than the living situation the child was currently in.<sup>937</sup> Wald argued that if decisions are made which focus on parental fault rather than harms to and the needs of the child, intervention could disrupt an environment in which the child was functioning at an adequate level. Therefore, in developing a statutory definition of neglect, Wald argued that the harm caused by the neglect must be serious and it must be a type of harm for which the remedy of intervention would do more good than harm. Wald argued that intervention should only be permissible:

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<sup>935</sup> Michael Wald, “State Intervention on Behalf of “Neglected” Children: A Search for Realistic Standards” (1974-1975) 27 Stan L R 985 at 992.

<sup>936</sup> *Ibid* at 994.

<sup>937</sup> *Ibid* at 1001.

[W]hen a child has suffered or is likely to suffer serious physical injury as a result of abuse or inadequate care; when a child is suffering from severe emotional damage and his parents are unwilling to deal with his problems without coercive intervention; when a child is sexually abused; when a child is suffering from a serious medical condition and his parents are unwilling to provide him suitable medical treatment; or when a child is committing delinquent acts at the urging or with the help of his parents.<sup>938</sup>

Although Wald provided this list of harms for which intervention would be justified, he argued that the decision to intervene would still have to be made on a case-by-case basis.<sup>939</sup> This child-focused approach would assure that the best interests of the child were being adhered to, and that decisions were not based solely on the court or agency's rejection of parental conduct or lifestyle. Understanding how removal may be damaging to a child, Wald advocated considering all other measures to ensure that the child's needs may be met in the home, before removal.

For children from marginalized families ensuring that measures were taken to keep the child in the home entailed providing families with sufficient housing, income and other resources in order to ensure that the family's poverty was not the underlying reason for removal. He wrote

In most such cases, intervention would not require removing the child. Rather services could be provided to help parents meet the child's emotional needs and to provide the parents with ways of handling the child that do not involve physical harm. Such help can take many forms: financial support, provision of support services such as day care or homemakers, or therapy for the parent. Since, in my experience, the families who would come under these standards are doing a minimal job, at best, of meeting the child's psychological needs, it seems unlikely that state intervention will harm children by making their parents appear less autonomous. In fact, intervention may help the many parents who are far from autonomous become more autonomous. By providing parents with useful services, economic support, and viable ways of dealing with their children, services can improve the parents' self-confidence and esteem. The child's view of the parents is likely to improve as well.<sup>940</sup>

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<sup>938</sup> *Ibid* at 1008.

<sup>939</sup> *Ibid* at 1012.

<sup>940</sup> Wald, "Thinking about Public Policy", *supra* note 921 at 674.



Wald advocated a bifurcated hearing process. The first stage of the hearing would test whether or not state intervention into the family was warranted and the second stage would allow a judge to make an order in the best interests of the child.<sup>941</sup> In this way, testing objective harms to the child would assist in constraining potentially unwarranted state intervention and direct state care towards remedying harm to the child. Only once harm had been established to the child could the judge engage on making the child placement decisions that Freud, Goldstein and Solnit's psychoanalytic model was meant to inform. Above all, Wald warned, "In each specific case, a court must decide two questions: (i) whether the child is suffering a harm which meets the statutory definition; and (2) whether, in the given case, intervention is likely to do more good than harm."<sup>942</sup>

In 1979, Freud, Goldstein and Solnit released their follow-up work to *Beyond the Best Interests of the Child*. Essentially, the book was a response to critics such as Wald and Mnookin. In addressing criticism that the authors had not provided a best interests standard that was attendant enough to the different functions of public, rather than private custody disputes, the authors developed a best interests standard that was applicable to child protection cases. In particular, the authors used their psychoanalytic model to argue *against* state intervention and in favour of family autonomy. First the authors argued that a child's attachment to a "psychological parent", in most cases will be a parent with whom they have been since birth. They argued that the importance of this psychological relationship and continuity in the context of this relationship spoke in favour of state

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<sup>941</sup> Michael S Wald, "State Intervention on Behalf of Endangered Children: A Proposed Legal Response," 6 (1982) Int J of Child Abuse and Neglect 3 at 4.

<sup>942</sup> Wald, "State Intervention on Behalf of 'Neglected' Children", *supra* note 935 at 1007.

intervention to remove the child from this relationship only in extreme cases.<sup>943</sup> Second, Freud, Goldstein and Solnit argued that the intervention itself could be detrimental to the child's psychological well-being. They wrote:

When family integrity is broken or weakened by state intrusion, [the child's] needs are thwarted and his belief that his parents are omniscient and all-powerful is shaken prematurely. The effect on the child's developmental progress is invariably detrimental.<sup>944</sup>

Therefore, the authors used a concept of the child's need for psychological continuity and security to ground a claim for a strong presumption of family autonomy. Even placing the family under a supervision order, they argued, was detrimental to a child's psychological well-being as it introduced uncertainty and compromised the child's view of her parents as autonomous and "all-powerful". Freud, Goldstein and Solnit therefore articulated a psychoanalytic account of family autonomy that was predicated in part on the child's right to "autonomous parents".<sup>945</sup> By the 1980s, their psychoanalytic model of family autonomy was accepted and practiced as part of "permanency planning" theory which favoured "family preservation" (leaving a child with parents whenever supports could be provided to minimize risks) over intervention.<sup>946</sup>

### **Legislating a Least Intrusive Model of Child Protection**

This new model of the "least intrusive intervention" model of child protection provided for a testing of the need for state intervention into the family to ensure that states

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<sup>943</sup> Joseph Goldstein, Anna Freud and Albert Solnit, *Before the Best Interests of the Child* (New York: The Free Press, 1979) at 7. For Wald's critique of *Before the Best Interests of the Child* see, Wald, "Thinking about Public Policy," *supra* note 921.

<sup>944</sup> *Before the Best Interests of the Child*, *ibid* at 8-10.

<sup>945</sup> *Ibid* at 14.

<sup>946</sup> Nicholas Bala, "Reforming Ontario's Child and Family Services Act: Is the Pendulum Swinging Back too Far?" (1999) 17 CFLQ 121 at 123.

were not unduly intruding on the private sphere of the family and violating family autonomy and integrity. Ontario, quickly followed by Alberta, were the first provinces in Canada to introduce this model of child protection.<sup>947</sup> These reforms were instituted in Nova Scotia in 1991 with the introduction of the *Children and Family Services Act*<sup>948</sup> (the “CFSA”) which replaced the *Children’s Services Act*<sup>949</sup> (the “CSA”). It is noteworthy, however, that in the 17 years between the release of *Beyond the Best Interests of the Child* and the introduction of the CFSA in Nova Scotia, social work practice had begun to adopt the guidelines set out by Freud, Goldstein and Solnit in working with children and in particular, in making child placement decisions based upon the least detrimental alternative.<sup>950</sup>

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<sup>947</sup> *Ibid* at 125:

The move towards a "family autonomy" model was perhaps most clearly apparent in the Ontario *Child and Family Services Act* of 1984. [SO 1984, c 55; see also Alberta's *Child Welfare Act*, SA 1984, c C-8.1] This Act included statements of principle that favoured "support for the autonomy and integrity of the family" and the "least disruptive alternative" for agency intervention. The definition of "child in need of protection" was narrowed. Vague grounds for agency intervention, like "parental unfitness," were eliminated, and the basis for state intervention was restricted to situations where there was a clear risk of serious harm to the child. If a court sanctioned state intervention, there was an onus on the agency to justify removing the child from the home rather than providing support in the home. There was encouragement for the involvement of aboriginal communities in child welfare decision-making and service provision; for aboriginal children removed from parental care there was a statutory preference for placement in aboriginal homes.

<sup>948</sup> SNS 1990, c 5.

<sup>949</sup> SNS 1976, c 8.

<sup>950</sup> Bala, “Pendulum Swinging Back too Far?”, *supra* note 947:

However, arguments in favour of leaving children in parental care in all but the clearest cases of abuse or neglect were forcefully articulated in the 1970s by the influential American scholars Goldstein, Freud and Solnit, who advocated preserving "continuity of relationships." Their ideas came to be reflected in the "permanency planning" theory. Permanency planning advocates favoured "family preservation" — leaving a child with parents whenever supports could be provided to minimize risks — and making decisions as early as possible in life to remove children from inadequate parents and place the child in another "permanent" home. In practice, however, at least in the 1980s, the family preservation aspects of permanency planning were emphasized while making early removal decisions was not emphasized.

Therefore, when the CFSA came into force on September 3, 1991, it served to legalize this shift to a focus on objective evidence of harm in guiding evaluations of the need for state intervention, and a more child-focused standard in child placing decisions. In sum, the introduction of the least intrusive intervention standard marked a shift from the child welfare system set out in Chapter 4, to a more exacting, legalistic and rights-based approach to “child protection”. The introduction of the CFSA, and the repeal of the CSA defined and strictly adhered to timelines and mandated the provision of services. It more clearly delineated a “finding” stage hearing to test the need for intervention and a disposition-stage “best interests” stage to guide child placement, and importantly, introduced more objective, evidence-based harms for intervention.

The Act evidenced a concerted focus on the child and the child’s needs in the Preamble, for example. The Preamble squarely places the child’s needs and rights as the focus of the Act, recognizing the importance of the child’s sense of time, in continuity in relationships and the promotion of healthy child development:

WHEREAS the family exists as the basic unit of society, and its well-being is inseparable from the common well-being;

AND WHEREAS children are entitled to protection from abuse and neglect;

AND WHEREAS the rights of children are enjoyed either personally or with their family;

AND WHEREAS children have basic rights and fundamental freedoms no less than those of adults and a right to special safeguards and assistance in the preservation of those rights and freedoms;

AND WHEREAS children are entitled, to the extent they are capable of understanding, to be informed of their rights and freedoms, to be heard in the course of and to participate in the processes that lead to decisions that affect them;

AND WHEREAS the basic rights and fundamental freedoms of children and their families include a right to the least invasion of privacy and interference with freedom that is compatible with their own interests and of society's interest in protecting children from abuse and neglect;

AND WHEREAS parents or guardians have responsibility for the care and supervision of their children and children should only be removed from that supervision, either partly or entirely, when all other measures are inappropriate;

AND WHEREAS when it is necessary to remove children from the care and supervision of their parents or guardians, they should be provided for, as nearly as

possible, as if they were under the care and protection of wise and conscientious parents;

AND WHEREAS children have a sense of time that is different from that of adults and services provided pursuant to this Act and proceedings taken pursuant to it must respect the child's sense of time;

AND WHEREAS social services are essential to prevent or alleviate the social and related economic problems of individuals and families;

AND WHEREAS the rights of children, families and individuals are guaranteed by the rule of law and intervention into the affairs of individuals and families so as to protect and affirm these rights must be governed by the rule of law;

AND WHEREAS the preservation of a child's cultural, racial and linguistic heritage promotes the healthy development of the child.

Pursuant to the provisions of the CFSA, a child will only be found to be “a child in need of protective services” by the state where the child has suffered harm or there is a substantial risk that the child will suffer harm and the child’s parent/s or guardian/s are unwilling or unable consent to services or otherwise alleviate the harm or risk of harm.<sup>951</sup>

Thompson explains the significance of this shift:

Just as the 1976 Nova Scotia Act substituted the more neutral “child in need of protection” for the former fault-oriented “neglected child” [in the 1967 Act], so too the new Act demonstrates a slight shift in emphasis, using the Alberta phrase “child in need of protective services”. A child in these situations needs not “protection” from parents, but the child and his or her family require the provision of “protective services”, with a view to maintaining the family intact or reuniting the family. In this sense, the very language reinforces the service orientation of the new Act.<sup>952</sup>

The Preamble to the CFSA was not only child-focused but it was meant to recognize the reality that many of the families involved with the child protection system were families living in poverty. The preamble provides that, “social services are essential to prevent or alleviate the social and related economic problems of individuals and families.” Furthermore, in recognition of the fact that coercive state intervention is warranted only where the family does not voluntarily agree to these offered services, the grounds for finding a child to be in need of protective services under the CFSA provide that substantial

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<sup>951</sup> CFSA, s 22.

<sup>952</sup> Thompson, *supra* note 842 at 39.

risk of harm will be found not just where substantial risk to the child can be shown, but where the parent or guardian “does not provide, or refuses, or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm”.<sup>953</sup>

Once state intervention has been justified on the basis that the child is in need of protective services and the court looks to make child placement decisions, the Act provides that no order for child placement can be made without the agency setting out a plan for the child’s care.<sup>954</sup> The Agency’s plan must include: a description of services; a statement of the criteria by which the Agency will determine when its care and custody or supervision is no longer required; an estimate of the time required to achieve its purpose; where the child is removed from parental care the Agency must state why and what efforts are planned to maintain contact with parents; where the Agency wants to remove the child permanently, a description of arrangements made for the child’s care.<sup>955</sup> The Act also provides that “the court shall not make an order removing the child from the care of the parent or guardian unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to section 13,” have been tried and failed, have been refused, or would be inadequate to protect the child.<sup>956</sup> Section 13 of the Act provides that services are necessary to promote the principle of least intrusive intervention and therefore the “Minister and the agency shall take reasonable measures to provide services to families and children that promote the integrity of the family.” Section 13 provides for the following services to promote the integrity of the family:

**Services to promote integrity of family**

13 (1) Where it appears to the Minister or an agency that services are necessary to promote the principle of using the least intrusive means of intervention and, in

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<sup>953</sup> See sections 22(2)(e), (f), (g), (h), (i), (j), (k), (l), and (m).

<sup>954</sup> Section 41(2).

<sup>955</sup> Section 41(3).

<sup>956</sup> Section 42(2).

particular, to enable a child to remain with the child's parent or guardian or be returned to the care of the child's parent or guardian, the Minister and the agency shall take reasonable measures to provide services to families and children that promote the integrity of the family.

(2) Services to promote the integrity of the family include, but are not limited to, services provided by the agency or provided by others with the assistance of the agency for the following purposes:

- (a) improving the family's financial situation;
- (b) improving the family's housing situation;
- (c) improving parenting skills;
- (d) improving child-care and child-rearing capabilities;
- (e) improving homemaking skills;
- (f) counselling and assessment;
- (g) drug or alcohol treatment and rehabilitation;
- (h) child care;
- (i) mediation of disputes;
- (j) self-help and empowerment of parents whose children have been, are or may be in need of protective services;
- (k) such matters prescribed by the regulations.

Importantly, pursuant to Wald and Mnookin's framework, the CFSA sets out the objective harms that the CAS would have to prove on a balance of probabilities in order to justify state intrusion into the private sphere of the family. The harms or substantial risk of harms<sup>957</sup> for which a child can be found to be in need of state protection include the following: physical harm, sexual abuse, failure to provide required medical treatment for a physical, emotional, mental or developmental condition,<sup>958</sup> emotional harm, physical harm caused by neglect, physical or emotional harm due to exposure to repeated domestic violence, abandonment, the child under twelve has killed or seriously injured another person or caused serious damage to another person's property, or has on more than one occasion injured another or caused loss of damage with the encouragement of a parent or because of the parent's inability to supervise the child.<sup>959</sup>

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<sup>957</sup> Section 22(1) of the CFSA provides that "substantial risk" means a real chance of danger that is apparent on the evidence.

<sup>958</sup> CFSA, s 22(2)(e) and s 22(2)(h)

<sup>959</sup> See section 22(2).

While the grounds for defining a child to be in need of protection under the CSA still contained notions of “propriety” and “fitness” allowing for value judgments – from judges, social workers, doctors and psychiatrists – the grounds contained at section 22 of the CFSA are meant to be objective, evidence-based and require actual proof of harm. D.A. Rollie Thompson explains the significance of the shift from the harms contained under the CSA to those under the CFSA:

The definitions of “child in need of protection” under the *Children’s Services Act* were subject to much criticism. The broad and vague language of s. 2(1)(1), in such terms as “without proper supervision or control”, “living in circumstances that are unfit or improper” or “in the care or custody of a person who is unfit, unable or unwilling to exercise proper care”, gave little guidance to agencies or courts, allowing too much scope for personal value judgments and uneven and arbitrary application. Moreover, this archaic language bore little resemblance to the standards actually applied by social workers, health professionals and others in the protection field, who speak of physical abuse, sexual abuse, failure to thrive, etc. Lastly, the older “child welfare” approach tended to focus attention upon the home environment and parental misconduct, rather than any specific harm to the child.<sup>960</sup>

The harms included at s. 22(2) of the Act are drawn almost verbatim from Wald’s suggestions.<sup>961</sup> While they necessarily involve a consideration of the result of parental conduct, they do not focus on parental conduct itself. Instead they are meant to focus very directly on the child and harms evidenced by observation of the child. For example, the ground of “neglect” has been replaced by a harm-centered focus on “physical harm” caused

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<sup>960</sup> Thompson, *The Annotated Children and Family Services Act*, *supra* note 842 at 39.

<sup>961</sup> See Wald, “State Intervention on behalf of ‘Neglected’ Children”, *supra* note 935 at 1008:

To summarize my conclusions, coercive intervention should be permissible only when a child has suffered or is likely to suffer serious physical injury as a result of abuse or inadequate care; when a child is suffering from severe emotional damage and his parents are unwilling to deal with his problems without coercive intervention; when a child is sexually abused; when a child is suffering from a serious medical condition and his parents are unwilling to provide him suitable medical treatment; or when a child is committing delinquent acts at the urging or with the help of his parents. Although more restrictive than existing law, these categories are similar to those covered by existing law. However, each harm is specifically defined; and the definition is drafted in terms of symptoms evidenced by the child, not in terms of parental conduct.



by neglect. The ground of emotional harm, for example, is not a stand-alone ground – it must be proven by objective evidence of “severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour”<sup>962</sup> exhibited by the child. Therefore, the introduction of the Act and the replacing of the definition of “child in need of protection” with “child in need of protective services” were meant to indicate a preference for a harm-based, objective evaluation of the need for state intervention in line with the least intrusive intervention standard. Following Wald’s formulation, setting out distinctly which harms constituted a child in need of protection would help eliminate judicial moralizing from evaluations of fitness and ensure that family privacy would be protected from undue intrusion by the state. Furthermore, the requirement that the state must show that it provide services to the family, and the judge’s obligation to the agency plan of care before child placement decisions which removed the child from the home could be made, were meant to test the actual character of that intervention.

It is also important that the grounds themselves are meant to promote the recognition that services are in the interests of promoting family autonomy. Most of the enumerated grounds provide that a child will only be found to be in need of protection where the parents are refusing services or where services are inadequate to protect the child. In all of these grounds, except for those listed at s. 22(2)(a) to (d) (physical and sexual abuse) there is a requirement that the child be found to be suffering these harms or to have suffered these harms (or risk of harm) and the parent refuses to accept services, or services would be inadequate to protect the child in the parent or guardian’s care.

The reforms advocated by child protection reformers in the 1970s and 80s attempted to secure family autonomy in the best interests of children by re-erecting a sphere of liberty around marginalized families and removing the moralizing regulation of parental rights

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<sup>962</sup> CFSA, s 22(2)(i).

that we saw in Chapter 4, as well as calibrating the potential coerciveness of state intervention with the family relative to the services provided. However, at the same time, substantive support for families in poverty was being scaled back, both by the welfare state and by changes to child protection practice. Only six months before the CFSA came into force, in-home services provided by Community Services was cut in half.<sup>963</sup> Furthermore, evaluations of harm to the child were becoming more “risk focused”; that is, more reliant on psychiatric evidence to point out abnormal behaviours.

The confluence of a privatization of support and an increasing reliance on “risk” in child welfare practice has resulted in what child protection theorists have labelled a return to a “residual”<sup>964</sup> model of child protection.<sup>965</sup> What reformers like Wald and Mnookin did not see when writing in the mid-1970s, was that society’s views on appropriate support for marginalized families were changing with the rise of neoliberalism and the scaling back of the welfare state. Nor did they foresee that the project of defining and regulating child abuse would come to be so thoroughly dominated by expert assessments of risk.<sup>966</sup> The prime source of coercion in the lives of marginalized families

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<sup>963</sup> Correspondence with DA Rollie Thompson, QC (31 May 2015) [on file with author].

<sup>964</sup> See Lessard, “Empire of the Lone Mother”, *supra* note 116 at 722. Lessard defines a residual model of child protection in the following manner:

The residual model of welfare defines the sphere of state engagement in welfare provision in negative terms and accords the primary role in addressing need and providing for the material support and welfare of individuals to the family and other institutions of the private sphere, most notably the market. To this extent the residual model reflects classical liberal values of individualism, self-reliance, and negative liberty.

See also, Peter M Cabrera, “An Examination of the Persistence of the Residual Child Welfare System in the United States: Addressing Charges of Radical Theoretical Myopia with Implications for Social Work Practice” (2009) 20 J of Prog Human Serv 26.

<sup>965</sup> Lessard, *ibid* at 751.

<sup>966</sup> It is important to note, however, that by 1990 Wald was very much aware of the prevalence of risk assessment tools and in the following article expressed concern over the methodological deficiencies of risk assessment tools. See Michael S Wald and Maria Woolverton, “Risk Assessment: The Emperor’s New Clothes?” (1990) LXIX Child Welfare 483.

in the child protection system would not just come from the biased decision-making of middle class, white judges and social workers, but from the expanding and “objective” definitions of harm, risk of harm, and best interests being developed by psychiatrists and psychologists and the hollowing out of material support for families in poverty. While Wald and Mnookin insisted on tying intervention to objective harms to the child – thereby hoping to limit coercive state interventions into the family – they weren’t yet able to see how a myriad of “abnormal behaviours” would come to be classified as harms or risk of harms to children, extending surveillance and control over marginalized families.

### **Neoliberal Restructuring of the Welfare State**

The 1970s in Canada saw high unemployment, high inflation and a growing public debt. This era also saw the articulation of a new way of organizing government that had been developing in Britain and the United States. After almost three decades of expanding social security in Canada, reformers were demanding cutbacks in government spending including the curtailment of universal programmes and tighter controls on eligibility for government assistance.<sup>967</sup> In 1975, the government announced that it would be cutting \$1.5 billion from its 1976-77 expenditures by reducing government spending on wages and social programs.<sup>968</sup> By 1978, eligibility for Unemployment Insurance was narrowed and benefit levels were reduced from 67% to 60% of weekly earnings.<sup>969</sup> The Minister of Finance at the time, Bud Cullen, declared that the purpose of the change was to “make it more attractive for potential unemployed insurance claimants to accept jobs now paying

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<sup>967</sup> Guest, *The Emergence of Social Security*, *supra* note 207 at 196.

<sup>968</sup> *Ibid.*

<sup>969</sup> *Ibid* at 197.

close to the current level of benefits.”<sup>970</sup> Cost savings from these measures would be used to implement “job-creating programmes”.<sup>971</sup> Employability was to be the central theme of the emerging neoliberal agenda.

The rise of neoliberalism beginning in the 1970s rang the death-knell for Keynesian social liberalism.<sup>972</sup> The notions of mutual responsibility which provided the impetus for the development of the *Unemployment Insurance Act* of 1944, for example, were being replaced with the idea that government intervention was responsible for the state of the country’s high levels of debt, unemployment and inflation. The federal government pointed to generous social programs as the cause of Canada’s debt – arguing by the mid-80s that smaller government was the answer.<sup>973</sup> In line with neoliberal thinking, the Conservative government of the mid-80s depicted big government as stifling of individuality, entrepreneurship and liberty. As Kim Campbell expressed in those days, “Our Government does not view Canadians as victims and does not see it as the role of government to perpetuate weakness and dependency.”<sup>974</sup> Instead of the large social security apparatus of the post-war welfare state, the government advocated targeting social programs and greater reliance on families and charitable organizations for caring services.<sup>975</sup>

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<sup>970</sup> *Ibid* at 201.

<sup>971</sup> *Ibid*.

<sup>972</sup> Rianne Mahon, “Childcare and Varieties of Liberalism in Canada” in Alexandra Dobrowolsky, ed, *Women and Public Policy in Canada: Neo-liberalism and After?* (Oxford: Oxford University Press, 2009) at 48 at 55.

<sup>973</sup> Maureen Baker and David Tippin, *Poverty, Social Assistance, and the Employability of Mothers: Restructuring the Welfare States* (Toronto: University of Toronto Press, 1999) at 70.

<sup>974</sup> Sylvia Bashevkin, *Welfare Hot Buttons: Women, Work, and Social Policy Reform* (Toronto: University of Toronto Press, 2002) at 31.

<sup>975</sup> Baker and Tippin, *supra* note 973 at 70.

Neoliberal restructuring of the welfare state in Canada saw clawbacks to child care subsidies; a greater emphasis on stricter public enforcement of private responsibility for social reproduction, such as child and spousal support;<sup>976</sup> and the overall decline of social service spending. In 1996, with the elimination of the Canada Assistance Program, the federal government provided a single block of funding to the provinces in the form of the Canada Health and Social Transfer (CHST).<sup>977</sup> The CHST reduced the amount the federal government provided to the provinces for social services and gave the provinces back control of how the money was to be spent.<sup>978</sup> With a decentralized system of social assistance, there would no longer be a uniform system of eligibility across the country. Instead of investing more money in the welfare state, the provincial governments focused on instituting work-for-welfare schemes (ie., “workfare”) and emphasized the importance “personal responsibility”<sup>979</sup> and of making recipients “job ready”.<sup>980</sup>

In the neoliberal agenda of small government and individual responsibility, workfare became a way of constructing welfare as a temporary respite for persons to take the time and opportunity to adjust their own behavior to the demands of the marketplace. Job skills upgrading, testing, assessments and even substance abuse screening emphasized that recipients’ need for welfare was caused by their own shortcomings which resulted in a lack of success in the labour market. In contrast to the welfarist thinking that expanded the post-war social security system in Canada, in the neoliberal mindset, material deprivation

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<sup>976</sup> Brenda Cossman, “Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project” in Cossman and Fudge, eds, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002).

<sup>977</sup> Baker and Tippin, *supra* note 973 at 86.

<sup>978</sup> *Ibid.*

<sup>979</sup> Bashevkin, *supra* note 974 at 31.

<sup>980</sup> *Ibid.*

is not as a result of inequalities built into advanced capitalism, but rather matters of individual human failing. Such an emphasis on the individual and personal responsibility was necessary for governments to step out of the business of subsidizing the risks inherent in a capitalist system.

Furthermore, instead of socializing the costs of caretaking work, neoliberal restructuring emphasized that such work should be borne by the private sphere, by families and the marketplace. By tying welfare eligibility to workfare, the labour that mothers put into caretaking work is not valued or considered “work” at all. Instead, through workfare, mothers were told that only labour conducted in marketplace had any value. The costs for reproductive labour undertaken in the home, was a matter of private, not public responsibility.

This devaluing of reproductive labour is evident in neoliberal welfare reforms that took place in Nova Scotia in 2000. As Stella Lord has written, “lone mothers on welfare in Nova Scotia were relatively protected from compulsory employability requirements until the *Employment Support and Income Assistance Act* (2000) came into effect under new regulations in 2001.”<sup>981</sup> As discussed in the previous chapter, by the late 1960s and 1970s in Nova Scotia activism by civil rights advocates had generated greater awareness of the structural determinants of poverty and the processes leading to the feminization of poverty. With the passing of the *Family Benefits Act* in 1977, a two-tier regime of social assistance had been established that distinguished recipients who were not expected to work, such as single mothers and the disabled, and those deemed to be employable.<sup>982</sup> However, Lord’s research indicates that by 2001, Nova Scotia moved from a two-tier

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<sup>981</sup> Stella Lord, *The Politics and Processes of Social Assistance Gender Regime Shift in Nova Scotia: From Voluntary ‘Rehabilitation’ to Compulsory ‘Employability’: 1980-2001* (PhD Thesis, Carleton University, Department of Sociology, 2009) at 1.

<sup>982</sup> Fay, *supra* note 779 at 160.

system of welfare provision which recognized social responsibility for child caring work, to a single-tier system in which eligibility for all was premised on employability criteria.

Lord writes that the crucial factors leading to the change in Nova Scotia's restructuring were not just the development of workfare criteria, but also the use of National Child Benefit clawed-back funds to offset early intervention programs for children<sup>983</sup>. The history of mothers' allowances revealed the provision of these allowances as a double-edged sword for women: providing mother-headed families with important public support while at the same time subjecting them to surveillance and denigrating assessments of "deservedness". However, the Allowances were instituted in recognition of the value of women's child caring work, no matter how essentialist these evaluations were. In contrast, Lord argues that the neoliberal restructuring of welfare was an example of gender-blind policy that has had particularly devastating effects for lone mothers including "maintaining women's vulnerability to poverty" and loss of autonomy.<sup>984</sup>

Feminist critics of welfare state policy have for some time noted the "privatizing trend" of the neoliberal reorganization of the welfare state and the effect that this privatization has had on women and particularly, low income women and lone mothers.<sup>985</sup> The scaling back of state responsibility for persons in poverty that began in the 1970s and 80s, they argue, is just a part of the overall processes of neoliberal restructuring that have had a profound effect on the social, political and economic position of women in poverty. Workfare for single mothers marks a new understanding of motherhood in welfare

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<sup>983</sup> *Lord, supra* note 981 at 351.

<sup>984</sup> *Ibid* at 396.

<sup>985</sup> See, for example, Baker and Tippin, *supra* note 973; Isabella Bakker, *Rethinking Restructuring* (Toronto: University of Toronto Press, 1996); Bashevkin, *supra* note 974; Ann Marie Smith, *supra* note 50.

discourse.<sup>986</sup> Once children were in school, mothers could return to the workforce. If single mothers experience difficulty in handling the duties of raising children and entering the workforce, this is constructed as a matter of personal failing, not the result of socio-economic inequality. While mothers' allowances were provided in recognition of the importance of keeping families together and of the negative effects of institutionalization, today, welfare eligibility is tied to a mother displaying her absolute inability to support herself by private means. Today, welfare eligibility is tied to a mother's willingness to find any other means of support other than social assistance,<sup>987</sup> including support from a

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<sup>986</sup> Martha Albertson Fineman, "Images of Mothers in Poverty Discourse" in MA Fineman and I Karpin eds, *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* at 208.

<sup>987</sup> *Employment Supports and Income Assistance Regulations*, NS Reg 25/2001 (as am), s 12:

An applicant or recipient is not eligible to receive assistance where there is another feasible source of income or applicable assets available that is sufficient to provide the applicant or recipient with basic needs, special needs or employment services that are being applied for or provided, as the case may be.



person deemed a “spouse”,<sup>988</sup> her acquiescence to an employability assessment<sup>989</sup> and adherence to an employment plan.<sup>990</sup>

### **The Changing Nature of Social Work: The Shift to Risk Assessment**

Not only has this new neoliberal mindset had profound effects on the economy and on the welfare state, in particular, but a number of scholars have written on how this

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<sup>988</sup> *Ibid*, ss 2, 47(1) and 23(1):

**2 (ac)** “spouse” means

- (i) a husband or a wife of an applicant or recipient, or
- (ii) a common law partner or a same-sex partner with whom an applicant or recipient is in a marriage-like relationship that is not a legal marriage;

...

(ja) “common-law partner” means a person who is living with another person in a relationship of interdependence functioning as an economic and domestic unit, and at least 1 of the following applies to the 2 persons in the relationship:

- (i) they have lived together for at least 12 continuous months,
- (ii) they are parents of a child or children by birth or adoption or share legal custody of a child or children,
- (iii) they lived together previously in a relationship of interdependence functioning as an economic and domestic unit for at least 12 continuous months, including any period of time the 2 persons were separated for less than 90 days, and have resumed living together in such a relationship,
- (iv) the 2 persons advise a caseworker that they are a common-law couple;

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#### **Chargeable income**

**47 (1)** Chargeable income shall be deemed to include

- (a) the income of the spouse of the applicant or recipient;
- (b) the income received by the applicant or recipient or the spouse of an applicant or recipient on behalf of a dependent child;

It is noteworthy that the definition of common law partner in the *ESIA* Regulations does not correspond to the definition of “common-law partner” in the *Maintenance and Custody Act*, RSNS 1989, c 160, s 2(aa): “common-law partner” of an individual means another individual who has cohabited with the individual in a conjugal relationship for a period **of at least two years**. [emphasis added]

<sup>989</sup> *Ibid* at s 17.

<sup>990</sup> *Ibid* at s 18.

mindset has fundamentally transformed the way that human services such as psychiatry, psychology, medicine and social work are performed.<sup>991</sup> As a result of a neoliberal emphasis on cuts to social spending and a focus on individual responsibility, human services have been reworked from being “caring professions” to become more streamlined and administrative in nature. Gone are the days of expensive therapeutic interventions, of costly institutionalizations and “round-the-clock” care; the buzz-words of the human services under neoliberalism are now “managerialism,” “efficiency,” and “risk”.<sup>992</sup> As opposed to dealing with the interpersonal problems in families, social work practice has taken on a managerial function.<sup>993</sup> This in turn has had an effect on the way that child protection work has been carried out with families in poverty, but it has also had effects on the social construction of mothers in poverty. Mothers in poverty who are unable to navigate both the demands of reproductive labour in the home and the need to maintain the economic self-sufficiency of their family without public support are more likely to be deemed to lack personal responsibility and to be labelled “dependent” personalities,<sup>994</sup> and

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<sup>991</sup> See for example, Nigel Parton, *Safeguarding Childhood: Early Intervention and Surveillance in Late Modern Society* (Basingstoke: Palgrave/Macmillan, 2006); Harry Ferguson, “Protecting Children in New Times: Child Protection and the Risk Society” (1997) 2 *Child & Fam Soc Work* 221; Karen Swift and Henry Parada, “Child Welfare Reform: Protecting Children or Policing the Poor?” (2004) 19 *J of L and Soc Pol* 1; Nico Trocmé et al, *The Changing Face of Child Welfare Investigations in Ontario: Ontario Incidence Studies of Reported Child Abuse and Neglect (OIS 1993/1998)* (Toronto: Centre of Excellence for Child Welfare, Faculty of Social Work, University of Toronto, 2002).

<sup>992</sup> Pat O’Malley, “Risk and Responsibility”, Barry, Osborne, Rose, eds, *Foucault and Political Reason: Liberalism, Neoliberalism and Rationalities of Government* (Chicago: University of Chicago Press, 1996) 189 at 197.

<sup>993</sup> Bob Lonnie, Nigel Parton, Jane Thomson, and Maria Harries, *Reforming Child Protection* (London: Routledge, 2009) at 51; Parton, “Changes to Practice and Knowledge in Social Work”, *supra* note 907.

<sup>994</sup> Fraser and Gordon, *supra* note 81.

“risky” mothers.<sup>995</sup> Much like the discourse of deservedness, for mothers and families deemed “high risk” even the most punitive of state interventions are justified.<sup>996</sup>

As discussed above, social policy theorists have noted over the past several decades that a hollowing out of the welfare state has meant a substantive change in the services provided to families in need in the child protection system. In the most recent report of the Minister’s Advisory Committee on *Children and Family Services Act* and *Adoption Information Act*<sup>997</sup> Committee members report that funding for services has consistently been one of the key areas of concern in these reports since the implementation of the CFSA provisions.<sup>998</sup> Further, the Nova Scotia Association of Social Workers has consistently complained that child protection agencies are not receiving the funding needed to properly implement the Act.<sup>999</sup> This concern over a lack of services and the effect this has had on the nature of social work with families in the child protection system in Nova Scotia led to the inclusion of a section in the last Minister’s Advisory Report (2008) of a section entitled “Lack of Trust in Child Protection Services”. The Committee reported in this section that:

Parents reported their experience of being subjected to long-term adversarial struggles with child protection workers and the system as a whole, feelings of profound injustice, and disempowerment. Many parents reported feelings of being controlled, manipulated and forced to comply with imposed plans. Social workers and parents spoke of the inability to access services except through the narrow window of apprehension or temporary custody orders, which parents experience as cruel and threatening.

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<sup>995</sup> Karen Swift, “‘Risky Women’: The Role of ‘Risk’ in the Construction of the Single Mother” in D Chunn and S Gavigan, eds, *Legal Tender of Gender: Law, Welfare and the Regulation of Women’s Poverty* (Oxford: Hart Publishing, 2010).

<sup>996</sup> *Ibid* at 158-159.

<sup>997</sup> Pursuant to section 88(1) of the CFSA, the Minister must establish an advisory committee to annually review the operation of the Act.

<sup>998</sup> Minister’s Advisory Committee 2008, *supra* note 53 at 12.

<sup>999</sup> *Ibid* at 15.

[T]he Committee heard from parents and professionals that lack of resources posed serious obstacles to establishing trust between families and child protection workers. Many individuals proposed compelling arguments for the use of mediation and the involvement of extended family members in decision-making, as a means to foster trust between agencies and families.<sup>1000</sup>

Critical social work theorists and sociologists have noted, not only how funding for child protection work has been scaled back, but importantly, how this shift has affected the very nature of social work in the child protection system. In particular, the ubiquitous use of “risk assessments” in compiling information on families, and the focusing of intervention on the basis of these risk assessments, has led to more families coming under the purview of the child protection systems and a more intrusive and coercive engagement with families in poverty.<sup>1001</sup>

The focus on risk in the human services can be traced back to a shift in psychiatry from evaluations of “dangerousness” to evaluations of “risk”. Robert Castel in his seminal piece, “From Dangerousness to Risk” has highlighted how the practice of psychiatry in the United States and France has moved from responding to and treating characteristics of “dangerousness”, to using scientific models to calculate risk. As psychiatry began to comprehend the moral, political, and even technical problems with controlling dangerousness in the asylum, it began to look outside the asylum and consider ways in which “madness” could be controlled in the community at large. Thus we begin to see the profusion of the practices of psychiatry as a science concerned with the “assessment of the *frequency* of mental illness and other abnormalities” based upon the statistical

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<sup>1000</sup> *Ibid* at 47.

<sup>1001</sup> Jane Waldfogel, *The Future of Child Protection: How to Break the Cycle of Abuse and Neglect* (Cambridge: Harvard University Press, 1998); Swift and Callahan, *supra* note 906; Pivot Legal Society, *Broken Promises: Parents Speak about B.C.’s Child Welfare System* (Vancouver: Pivot Legal Society, 2008).

correlations.<sup>1002</sup> Experts in the field of psychiatry began to explain the existence of deviants or “populations at risk”<sup>1003</sup> as a consequence of the objective risks inherent in the living conditions of the disadvantaged – malnutrition, alcoholism, housing conditions, sexual promiscuity, etc.<sup>1004</sup> The key for psychiatry and other public authorities was to undertake surveillance of these people based upon the level of risk they represented and therefore to engage in a “preventive prophylaxis”.<sup>1005</sup> The goal, however, is not to treat these people – their pathological constitutions were not amenable to treatment – but to control and regulate their behavior.<sup>1006</sup>

Risk began to take a central role in this new, socially-focused psychiatry. Whereas surveillance and treatment in the asylum was contained, with the patient being subject to constant surveillance and treatment being accessible should a “dangerous” situation arise, “social” psychiatry needed to devise mechanisms for targeting what became an infinite amount of potential space of surveillance. Castel explains how risk became a central tool:

The presence of some, or of a certain number, of these factors of risk sets off an automatic alert. That is to say, a specialist, a social worker for example, will be sent to visit the family to confirm or disconfirm the real presence of danger, on the basis on the probabilistic and abstract existence of risks. One does not start from a conflictual situation observable in experience, rather one deduces it from a general definition of dangers one wishes to prevent.<sup>1007</sup>

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<sup>1002</sup> Castel, “From Dangerousness to Risk”, *supra* note 94 at 284.

<sup>1003</sup> *Ibid.*

<sup>1004</sup> *Ibid.*

<sup>1005</sup> *Ibid* at 285.

<sup>1006</sup> Rose, “Psychiatry as a Political Science”, *supra* note 85 at 15.

<sup>1007</sup> Castel, “From Dangerousness to Risk”, *supra* note 94 at 288.

Therefore, psychiatry identified itself as the science of devising risk factors for “systemic pre-detection”<sup>1008</sup> in the twentieth century. It is for this reason that Castel writes that the new strategies of psychiatry “dissolve the notion of a subject or a concrete individual, and put in its place a combinatory of factors, the factors of risk.”<sup>1009</sup> Shifting the practices of human services in this way makes them amenable to the practice of “administrative assignation” where professionals use their expertise to diagnose an individual and then prescribe ways of managing rather than treating deviancy.<sup>1010</sup> Nikolas Rose has written that the techniques of psychiatry, in utilizing risk, strive to bring future consequences into the present and provide the individual with techniques to “self-manage”.<sup>1011</sup> While the expert provides the tools, ultimately the individual is responsible for regulating themselves.

In the “risk-frame” of advanced liberalism, the individual who acts against their own self-interest is singled-out as risky, as a psychiatric subject which must be controlled and managed through the “administrative function of expertise.”<sup>1012</sup> Rose writes that, “Failures of management of the self, lack of skills of coping with family, with work, with money, with housing, are now all, potentially, criteria for qualification as a psychiatric subject.”<sup>1013</sup> In its bid to identify the difficulties of conduct involved in constructing responsible, industrious citizens, psychiatric knowledge in a neoliberal age must be used to identify those who, but for their expression of a pathological agency or autonomy, could

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<sup>1008</sup> *Ibid.*

<sup>1009</sup> *Ibid* at 281.

<sup>1010</sup> *Ibid* at 291.

<sup>1011</sup> Rose, “Psychiatry as a Political Science”, *supra* note 85 at 8.

<sup>1012</sup> *Ibid* at 17.

<sup>1013</sup> *Ibid* at 15.

be integrated into the system as workers. If it can be shown that individuals are acting as responsible agents in their failure to enter the workforce, take their meds and abstain from substance abuse, for example, then they can be said to be acting in a risky manner and the state can be shown to be morally justified in penalizing them.

Social work theorists have argued that the use of risk assessment tools have helped to structure social work so that information is collected and analyzed “administratively” and then “clients” are provided with the tools to self-manage. According to Nigel Parton after the introduction of the *NHS<sup>1014</sup> and Community Care Act* in the UK in 1990, social work became focused primarily on “assessment, planning, care management, negotiating, coordinating, operating the law and procedures and using information technology”.<sup>1015</sup> Parton claims that social work has moved from working with relationships to collecting information on clients and determining where risk lies. In particular, he writes that computer technologies have allowed the logic of risk management to proliferate in child protection work, reproducing this streamlined approach to managing clients in its ability to identify and calculate risk using computer technologies.<sup>1016</sup> He writes that,

Increasingly, it seems that the key focus of activity of social work and social care agencies is concerned with the gathering, sharing and monitoring of information about the individuals with whom they come into direct and indirect contact, together with accounting for their own decisions and interventions, and those of the other professionals and agencies with whom they work.<sup>1017</sup>

Social work theorists have pointed to a similar trend occurring in child protection practice in Canada. In particular, they point to the ubiquitous use of risk assessment to guide social work knowledge and action within the family as particularly problematic. As

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<sup>1014</sup> England’s National Health Service.

<sup>1015</sup> Parton, “Changes in the Form of Knowledge in Social Work”, *supra* note 907 at 259.

<sup>1016</sup> *Ibid.*

<sup>1017</sup> *Ibid* at 254.

services for child protection work are scaled back, the role of the child protection worker is changing. The front line worker has little discretion and often no longer has much contact with the family involved in proceedings.<sup>1018</sup> The worker serves more in an administrative capacity and relies upon the work of experts to assist in making decisions regarding intervention and child placement. Risk assessment tools assist the worker to categorize the family according to whether their level of risk, and interventions are targeted accordingly. The risk assessment obviates the need for the front line worker to have much interpersonal knowledge of the family, or indeed to have much personal contact with the family under investigation. Furthermore, because assessments are predicated on objective and standardized criteria, worker decisions are more transparent, making them more accountable to managers and others.<sup>1019</sup>

The move towards a risk assessment focus in child welfare in Canada is most apparent in the 1970s and 80s with the discovery of child sexual abuse and the resultant rise of sexual abuse complaints.<sup>1020</sup> Perhaps the most obvious articulations of an intentional move towards a risk assessment focus in child protection law and jurisprudence can be found in British Columbia's *Gove Inquiry Report* (1995)<sup>1021</sup> and the *Report of the Panel of Experts on Child Protection compiled by the Minister of Community and Social Services* (the "Hatton Report") in Ontario (2000)<sup>1022</sup>. In these two reports, compiled as a result of concerns with child deaths in the child protection systems,

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<sup>1018</sup> Swift and Callahan, *At Risk*, *supra* note 906 at 97.

<sup>1019</sup> *Ibid* at 100.

<sup>1020</sup> Bala, "Pendulum Swinging Back too Far?", *supra* note 947 at para 28.

<sup>1021</sup> British Columbia, The Honourable Judge Thomas J. Gove, *Report of the Gove Inquiry into Child Protection in British Columbia* (Victoria, British Columbia: Queen's Printer, 1995).

<sup>1022</sup> Ontario, Mary Jane Hatton, *Report of the Panel of Experts on Child Protection* (Toronto: Ministry of Community and Social Services, 2000).



calls were made for the introduction of risk assessment tools and risk management techniques in the name of safety and greater accountability for worker decision-making. Both reports recommended amending legislation in order to provide for increased surveillance of parents involved with protection authorities; lowering the threshold for Agency intervention, including lowering the threshold for what constitutes “risk”; incorporating risk assessment tools and calculating future harms through actuarial measures and reliance on human services expertise; and finally, increasing attention to professional accountability, consistency and focus on liability.

Social work theorists Karen Swift and Marilyn Callahan note that, “projecting the risks of a child being harmed at some point in the future has always been a feature of child protection work.”<sup>1023</sup> However, what is noteworthy in the use of risk assessment in child protection work is that “it is only recently that attempts to categorize parents or caregivers at various levels of risk for the purposes of determining intervention have been systematically and scientifically pursued.”<sup>1024</sup> Furthermore, risk assessment criteria set out whether parents are “high risk” or “low risk” based upon a number of criteria. A family’s identification as “high risk,” will dictate the type of intervention:

Risk assessment works to separate those who ‘ought to be’ independent from those deemed to be in need of monitoring. It creates gradations of ‘risk classes’ and justifies the application of ‘appropriate’ amounts of legally sanctioned surveillance to those groups. In child welfare, groups scored as less risky are engaged in risk reduction, which is aimed at a goal of ‘independence’. Those scored as most risky are viewed as potential child killers. They are ‘one step away from an inquest’ (Worker), and are treated accordingly. In this circumstance, intensified legal action appears reasonable, even though many of the actions taken occur on the basis of *what might happen*, and not what *has* happened.<sup>1025</sup>

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<sup>1023</sup> Swift and Callahan, *At Risk*, *supra* note 906 at 118.

<sup>1024</sup> *Ibid* at 119.

<sup>1025</sup> Swift “Risky Women”, *supra* note 84 at 159.

Addressing risk in terms of “safety” means that interventions are not necessarily focused on family preservation and working with the interpersonal relationships in the home. Counter to Wald’s recommendations, the intervention with the high risk family who may potentially face the most of coercive of interventions – removal of the child from the home – will not necessarily receive material supports such as housing or income maintenance. Rather, families, and particularly, mothers, labelled high risk:

[J]oin other high-risk groups ranging from mental patients to terrorists which society is encouraged to control; they are one of many groups now legally justifying reduced privacy and increased intrusion by authorities into personal life; they, along with others, act as powerful examples of the high cost of seeming to depart from social norms.<sup>1026</sup>

Over the past several years, in Nova Scotia, while there has been no new core funding provided for the Department of Community Services,<sup>1027</sup> some indicate that there has been a sharp increase in referrals, investigations and cases of substantiated maltreatment. In 2012-2013 there were 9035 referrals, 6601 investigations and 1249 substantiated cases of maltreatment.<sup>1028</sup> In 2014-2015, however, these numbers rose sharply to 14,045 referrals, 9530 investigations and 3431 substantiated cases of maltreatment.<sup>1029</sup> In 2014-2015 1200 supervision orders were issued and 114 children were brought into care that year. Numbers from the Department indicate that only 5.6% of court proceedings result in permanent care and custody orders which see the permanent

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<sup>1026</sup> *Ibid* at 158.

<sup>1027</sup> See Provincial Budgets for 2012-2013 to 2014-2015, online: Department of Finance <<http://www.novascotia.ca/finance/en/home/budget/budgetdocuments/default.aspx>>. Two million dollars has been announced by the Honourable Joanne Bernard for family resource centers. Nova Scotia, House of Assembly, *Hansard*, 62<sup>nd</sup> Ass, 2<sup>nd</sup> Sess (7 May 2015) at 5148 (Hon J Bernard).

<sup>1028</sup> Nova Scotia, House of Assembly, *Hansard*, 62<sup>nd</sup> Ass, 2<sup>nd</sup> Sess (7 May 2015) at 5148 (Larry Harrison).

<sup>1029</sup> *Ibid*.

removal of the child from the home.<sup>1030</sup> This means that the majority of cases in Nova Scotia see families placed under supervision orders. As will be discussed in greater detail below, research conducted in Nova Scotia has shown that the most frequent services provided to these parents at removal are supervision services, parenting education courses and capacity assessments.<sup>1031</sup> Therefore, while risk assessments structure when the agency will intervene in the family and how, the intervention itself is largely one of surveillance and monitoring of parental behavior in the name of child safety.

Swift and Callahan also argue for a critical appraisal of the use of risk assessment tools for their capacity to obscure social and economic factors. When using a risk assessment tool in child protection work, they note that,

Child welfare services, with few exceptions, do not focus investigative efforts on groups or communities or on social and economic policies that may create unsafe conditions for children. Risk assessment in child welfare means risks posed by and to specific individuals; therefore, risk assessments do not address social risks. The public apparently shares with professionals an understanding of risks to children to be those risks posed by parents and not those posed, for instance, by poverty.<sup>1032</sup>

The authors challenge assumptions that risks are value-free and argue that the application of risk assessment tools have serious consequences for marginalized families.<sup>1033</sup> In focusing attention on supposedly objective factors risk assessment tools may hide structural problems such as poverty and individualize them – make them the consequence of parental characteristics and behaviours as opposed to structural inequality. Further, these supposedly “neutral” criteria may also be based on white, Westernized, middle-class assumptions about what is best for children. Throughout the history of child protection law and practice, assumptions about what is normal and

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<sup>1030</sup> *Ibid* per Bernard.

<sup>1031</sup> Blackstock, *When Everything Matters*, *supra* note 909.

<sup>1032</sup> Swift and Callahan, *At Risk*, *supra* note 906 at 149.

<sup>1033</sup> *Ibid* at 107-108; 143.

abnormal have often enfolded value judgments based upon a white, middle class, ableist ideal. Socio-economically marginalized families who do not fit this ideal are more likely to be labelled abnormal or “risky”, and these families will find themselves subjected to intrusive interventions by child protection authorities.

While risk assessment tools are used by social workers to determine whether or not to intervene in the family, another form of risk assessment tool is often used by the courts and the Agency to determine child placement once a finding has been made: the parenting capacity assessment. Parenting capacity assessments are assessments done by an unregulated group of professionals called parenting capacity assessors who may have social work or other mental health professional backgrounds but need not be psychiatrists or degreed social workers. Capacity assessments essentially answer for the judge where the child is best placed: with the parents, extended family (or other guardian) or in foster care.

The increasing ubiquity of parenting capacity assessments has been called into question by members of the social work and legal communities including Ontario Court of Justice judge, Justice Carol Curtis. In her article, “Limits of Parenting Capacity Assessments in Child Protection Cases”<sup>1034</sup> Justice Curtis warns that the parenting capacity assessments and the assessors who draft them currently have a great amount of power and influence over child protection proceedings in Ontario. She argues that it is important for judges and lawyers to critically examine the assessments and conclusions drawn by the assessors. She notes that the families involved in the child protection system are suffering socio-economic marginalization and “they are often from a dramatically different socioeconomic group than the judge, the lawyers, and the social workers in the case.”<sup>1035</sup>

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<sup>1034</sup> (2009) 28 CFLQ 1.

<sup>1035</sup> *Ibid* at 2.

In particular, Justice Curtis calls on judges to critically examine the need for the assessment, the questions asked of the assessor and the qualifications of the assessor. She warns of the biases and difficulties presented when marginalized people are confronted with assessments of their parenting abilities and calls on judges to watch for these biases.<sup>1036</sup> Recent work on the use to be made of parenting capacity assessments in Nova Scotia, for example, has also stressed a contextualized view of parenting to ensure it is “good enough” to meet the needs of the child at hand. They urge attention to environmental context, meaning that “the assessor has considered both the risks and supports and signs of safety that exist. For example, a parent with mental health struggles living in poverty may never the less have the support of a family member in close proximity along with other community supports.”<sup>1037</sup> Without attention to the structural contexts in which these families find themselves, risk assessment tools can serve to perpetuate existing disadvantage.

Therefore risk assessment tools and capacity assessments not only respond to a social service environment which has seen funding for services and personnel scaled back, as well as an insistence on securing the safety of children and worker accountability, but the category of risk serves to establish causation for poverty in parental failure to self-manage. Furthermore, when we consider that the welfare discourse of neoliberalism constructs parents in poverty as presumptively lacking in a sense of “personal responsibility” or “insight”, it is easy to see how this lack of personal responsibility can be interpreted as parental deficit constituting a risk to children.

In shifting a focus onto parental conduct and parental deficit, the focus on risk absolves the state of responsibility for providing substantive material supports for the

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<sup>1036</sup> *Ibid* at 17.

<sup>1037</sup> See Peter W Choate and Karen Hudson, “Parenting Capacity Assessments: When they Serve and When they Detract in Child Protection Matters” (2014) 33 CFLQ 33 at 40.

family in poverty and justifies a coercive intervention with families. In the next sections I will argue that the focus on assessing and predicting risk has changed the way that the child protection system understands and addresses harm to children, in the process, shifting attention away from the child and the child's needs and onto damaging evaluations of parental conduct.

### **From Objective Harms to Risk of Maltreatment**

By the 1970s and 80s there was a general public awareness of the occurrence both of battered child syndrome, and by the 1980s, of battered wife syndrome.<sup>1038</sup> The conception of harms advocated by Wald and Mnookin in developing a least intrusive model of child protection fit very much into the growing awareness of child abuse as a consequence of family violence as a whole. Advocates of the least intrusive intervention model of child protection, including Freud, Goldstein and Solnit in their follow up work in 1979, advocated for a focus on objective harms and substantial risk of harm in order to ensure the necessity of state intervention into the family. The harms listed at section 22(2) of the CFSA can be contextualized in an overall movement in the 1980s that saw greater attention being paid to criminalizing and addressing violence in the family and the need to respond to this violence.

The harms introduced in the CFSA were objective harms largely aimed at targeting “child abuse”, understood largely as physical or sexual violence or emotional abuse marked by severe psychological stress. Even the ground of “neglect” in the Act is defined in such a way as to reflect this “child abuse” frame: the child will not be found to be a child in need

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<sup>1038</sup> See Nicholas Bala, “An Historical Perspective on Family Violence and Child Abuse: Comment on Moloney et al, Allegations of Family Violence, 12 June 2007” (2008) 14 J of Fam Stud 271 at 273-274.

of protection on the basis that he or she has suffered neglect. Rather, the child must be shown to have suffered “physical harm caused by chronic and serious neglect”.<sup>1039</sup> This ground of intervention is provided for in such a way as to recognize that chronic neglect can lead to physical harm while at the same time attempting to do away with the former fault-oriented notion of the “neglected child” in previous child protection statutes. Even the ground of emotional harm requires that the child display certain behaviours in order to ground a finding of harm: “severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour”. Finally, there is a recognition at s. 22(2)(i) that the child herself need not be harmed by violence in the family, but has to be shown to have been exposed to family violence and be emotionally harmed by this exposure.

Across Canada, the 1980s saw reform in the areas of criminal law and family law that promoted better criminal prosecutions of the perpetrators of violence against women and children, and ensured greater safety for the victims of family violence.<sup>1040</sup> Feminist agitations for greater recognition and prosecution of family violence saw the criminalization of “marital rape” in 1983.<sup>1041</sup> Until this time, the common law provided an immunity for a man who raped his wife – the *Criminal Code* definition of rape precluded non-consensual sex with a man’s wife.<sup>1042</sup> Family legislation saw women able to make

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<sup>1039</sup> CFSA, s 22(2)(j).

<sup>1040</sup> See Bala, “An Historical Perspective”, *supra* note 1038 at 274.

<sup>1041</sup> Jennifer Koshan, “The Legal Treatment of Marital Rape and Women’s Equality: An Analysis of the Canadian Experience” (September 2010) at 3, online: The Equality Effect: <http://theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf>.

<sup>1042</sup> See *ibid* at 10: In the 1970 *Criminal Code* the definition of rape at section 143 provided:

- 143 A male person commits rape when he has sexual intercourse with a female person who is not his wife
- (a) without her consent, or
  - (b) with her consent if the consent
    - (i) is extorted by threats or fear of bodily harm,
    - (ii) is obtained by personating her husband, or

applications for exclusive possession of the matrimonial home in cases of spousal violence and custody decisions required consideration of the effects of spousal violence.<sup>1043</sup> Opening up the common law construction of the family and exposing male violence to regulation by the courts helped to ensure the safety of women and children. Feminists sought to shift focus from notions of choice or moralistic value judgment that saw married women as implicitly consenting to rape or assault within the marriage or the casting of victims of rape as morally blameworthy for their victimization. Feminists argued that this focus on the moral regulation of women as opposed to the criminal conduct of men served to reproduce patriarchy in the family and in society at large.<sup>1044</sup>

Indeed, studies today continue to reveal that violence in the family is largely gendered – the most recent statistical profile of family violence compiled by Statistics Canada reveals that “In 2010, 7 in 10 (70%) of victims of police-reported family violence were girls or women.”<sup>1045</sup> Furthermore, the statistical profile reveals that the movement to criminalize family violence has been largely a successful one in terms of the rate of charges being laid:

According to police-reported data, intimate partner violence was more likely than non-intimate partner violence to result in charges being laid or recommended (68% versus 38%). Charges were also more common when the victim of intimate partner violence was a woman (71%) than a man (57%).<sup>1046</sup>

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(iii) is obtained by false and fraudulent representations as to the nature and quality of the act.

<sup>1043</sup> See Bala, “An Historical Perspective”, *supra* note 1038 at 274.

<sup>1044</sup> Koshan, *supra* note 1041 at 14.

<sup>1045</sup> Statistics Canada, *Family Violence in Canada: A Statistical Profile* (Ottawa: Minister of Industry, 2011) at 13.

<sup>1046</sup> Statistics Canada, *Highlights of Family Violence in Canada: A Statistical Profile* (Ottawa: Minister of Industry, 2011) at 1.



What exactly constitutes “family violence” is significant as there is no accepted definition of the term. Statistics Canada’s profile of family violence indicates that the definition of family violence upon which the statistics are based “can encompass physical, sexual, verbal, emotional, and financial victimization, or neglect. Within this publication, analysis of violence within the family is primarily based on statistical data that are consistent with Criminal Code definitions, unless otherwise stated.”<sup>1047</sup> The working definition of family violence, then, is very much a criminal notion of family violence. The Statistics Canada report indicates that while there is no separate family violence offence in the *Criminal Code*, “family members can be charged with the appropriate criminal offence, such as homicide, assault, sexual assault, or criminal harassment.”<sup>1048</sup> The fact of the offence occurring in the family is an aggravating factor. The criminalized nature of family violence as contained in the profile is also evident in terms of the source of data used to compile the profile. The two main sources of data for the statistical profile comes from both a survey of police reports, as well as self-report from the General Social Survey on Victimization (the “GSS”).<sup>1049</sup> The GSS is a voluntary household survey and so it may not expose unreported incidents of family violence.

In 2001, the Nova Scotia legislature adopted the *Domestic Violence Intervention Act* (the “DVIA”).<sup>1050</sup> The Act is aimed at providing for emergency protection orders for victims of domestic violence. Emergency protection orders may include time-limited

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<sup>1047</sup> *Family Violence in Canada*, *supra* note 1045 at 9.

<sup>1048</sup> *Ibid* at 10. It is also important to point out that the Criminal Code of Canada contains offenses that include abandonment and neglect; offenses which are often pursued under the *Children and Family Services Act*: see *Criminal Code*, RSC 1985, c C-46, ss 215, 218, 219-221.

<sup>1049</sup> *Ibid* at 71.

<sup>1050</sup> SNS 2001, c 29 [hereinafter, DVIA].

orders for: exclusive possession of the victim's residence; removal of the respondent from the residence; restraints on communication, movement, or dealing with property; and temporary possession orders for certain specified personal property such as cars, bank cards, health cards or insurance, etc.<sup>1051</sup> Important for our purposes here is the definition of domestic violence contained in the Act:

5 (1) For the purpose of this Act, domestic violence has occurred when any of the following acts or omissions has been committed against a victim:

- (a) an assault that consists of the intentional application of force that causes the victim to fear for his or her safety, but does not include any act committed in self-defence;
- (b) an act or omission or threatened act or omission that causes a reasonable fear of bodily harm or damage to property;
- (c) forced physical confinement;
- (d) sexual assault, sexual exploitation or sexual molestation, or the threat of sexual assault, sexual exploitation or sexual molestation;
- (e) a series of acts that collectively causes the victim to fear for his or her safety, including following, contacting, communicating with, observing or recording any person.

(2) Domestic violence may be found to have occurred for the purpose of this Act whether or not, in respect of any act or omission described in subsection (1), a charge has been laid or dismissed or withdrawn or a conviction has been or could be obtained.

The definition of domestic violence, then, is very much "criminal" in nature. Domestic violence is defined in terms of acts: assault, threats, confinement, sexual assault or threats, and harassment.

It is also important to note, however, that since the late-1960s, battered child syndrome and later in the 1980s, battered wife syndrome,<sup>1052</sup> were increasingly viewed as

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<sup>1051</sup> DVIA, s 8(1).

<sup>1052</sup> See Nicholas Bala, "An Historical Perspective on Family Violence and Child Abuse: Comment on Moloney et al, Allegations of Family Violence, 12 June 2007" (2008) 14 J of Fam Stud 271 at 273-274; for example, the following article sets out the physician's role in detecting battered wife syndrome, see Richard W Swanson, "Battered Wife Syndrome" (March 15, 1984) 130 Can Med Assoc J 709 at 710-11.

The physician's primary role is to identify the syndrome. This can usually be done only with straightforward, nonthreatening open-ended questions to the patient; for example, "In

medicalized conditions. The “discovery” of battered child syndrome is generally thought to have occurred with the publication of C. Henry Kempe *et al*'s, “The Battered-Child Syndrome” in the Journal of the American Medical Association in July 1962.<sup>1053</sup> In their article, Kempe et al define battered-child syndrome as:

[A] clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent. The condition has also been described as ‘unrecognized trauma’ by radiologists, orthopedists, pediatricians and social service workers. It is a significant cause of childhood disability and death. Unfortunately, it is frequently not recognized, or, if diagnosed, is inadequately handled by the physician because of hesitation to bring the case to the attention of the proper authorities.<sup>1054</sup>

Kempe et al reported a high incidence of battered child syndrome: among 71 hospitals, 302 cases were reported to have occurred. They reported that “on a single day, in November 1961, the Pediatric Service of the Colorado General Hospital was caring for 4 infants suffering from the parent-inflicted battered-child syndrome.”<sup>1055</sup> The article indicates that of these four children, three died. Kempe et al explain the reason for the failure of the medical community to correctly diagnose battered child syndrome:

Yet there is reluctance on the part of many physicians to accept the radiologic signs as indications of repetitive trauma and possible abuse. This reluctance stems from the emotional unwillingness of the physician to consider abuse as the cause of the child's difficulty and also because of unfamiliarity with certain aspects of fracture healing so that he is unsure of the significance of the lesions that are present. To the informed physician, the bones tell a story the child is too young or too frightened to tell.<sup>1056</sup>

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what areas do you and your spouse experience conflict?" or "How does your spouse express anger?". The problem can often be detected by observing the nonverbal response, such as hesitation or a lack of eye contact, as well as the verbal response. The physician should then ask more specific questions, such as "Does your husband beat you?", "When was the last time?", "How often?" and "In what ways?". The patient should also be questioned about whether her children have been abused.

<sup>1053</sup> C Henry Kempe et al, “The Battered-Child Syndrome” (1962) 181.1 JAMA 17-24.

<sup>1054</sup> *Ibid* at 17.

<sup>1055</sup> *Ibid*.

<sup>1056</sup> *Ibid* at 18.

The article outlined for physicians how to evaluate and diagnose battered child syndrome. Kempe et al advised that physicians should search for the syndrome “in any child exhibiting evidence of possible trauma or neglect (fracture of any bone, subdural hematoma, multiple soft tissue injuries, poor skin hygiene, or malnutrition)” or where a doctor’s clinical findings do not seem to accord with the “historical data” supplied by the parents.<sup>1057</sup> The message of the article was clear: physicians had a special knowledge and obligation to watch for signs of a potentially ubiquitous phenomenon of child battering.

Medicalized understandings of child abuse served not only to make the existence of abuse in the home a public concern and amenable to criminal evidentiary standards, but it also removed the moralizing aspects of child cruelty that had attached to it in the era of Victorian cruelty to children. Now, it was understood that any family was capable of child abuse and not just poor families. As Alan Hunt has pointed out, drawing on the work of Ian Hacking and others<sup>1058</sup>:

Concern with ‘cruelty to children’ emerged in the 1870s as an offshoot of the cruelty to animals movement. Since then there has been an important shift from the focus on ‘cruelty to children’ to ‘child abuse’. The key feature of this transition was that ‘cruelty’ had been organised around a class moralisation; it was the uncivilised lower orders who were cruel to their children. In contrast, ‘abuse’ is stripped of class referents; it is a generic condition of relations between parents and children and, most often, between fathers and children.<sup>1059</sup> [citations omitted]

Given that child abuse is stripped of its class referents, we might expect today that we would see all classes represented in the child protection jurisprudence and in child protection statistics. However, as the Canadian Incidence Study statistics outlined below reveal, lower-income families are overwhelmingly represented in the child protection

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<sup>1057</sup> *Ibid.*

<sup>1058</sup> Hacking, *supra* note 904; Pfohl, *supra* note 575.

<sup>1059</sup> Alan Hunt, *Governing Morals: A Social History of Moral Regulation* (Cambridge: Cambridge University Press, 1999) at 203.

system. Furthermore, racialized families continue to be a focus of child protection authorities even in the era of medicalization of child abuse. At the very least, then, we may expect in an era where the very grounds of intervention provided for in the CFSA are predicated on these objectively-based harms from the criminal/child abuse field that we will see a greater focus on sexual and physical abuse of children. However, as the results of the Canadian Incidence Study of Reported Child Abuse and Neglect (the “CIS”) discussed below indicate that this is not the case. Emotional harm, neglect and exposure to domestic violence between parents or others in the home dominate the child protection arena. Furthermore, it is not the expertise of physicians and criminal justice system that is brought to bear on understanding and remediating these forms of child abuse. Rather, psychiatric and psychological explanations have come to almost completely dominate the field of what is understood as child abuse in the child protection regime. As discussed above, psychiatric evaluations of risk and risk assessment have come to dominate evaluations of what type of parent will go on to harm their child.

The CIS is the largest survey of the incidence of reported child abuse in Canada.<sup>1060</sup> The first indication that the definition of child abuse contained in the CIS does not map squarely onto the family violence literature is that the study looks at cases of “maltreatment” rather than incidents of “abuse”. While this might seem like merely a semantic difference, the difference between “harms” and “maltreatment” is revealed as especially significant in light of the data collected and the overall findings of the CIS. First, the CIS is not concerned with crime *per se*: the CIS collects data from child welfare agencies only and specifically does not compile data on cases investigated only by

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<sup>1060</sup> *Canadian Incidence Study of Reported Child Abuse and Neglect – 2008*, *supra* note 910 at 7: The CIS receives funding from the Public Health Agency of Canada and a “consortium of federal, provincial, territorial, Aboriginal and academic stakeholders”.

police.<sup>1061</sup> The quality or preponderance of harms on which child protection authorities have focused is also significant: the CIS found that for the year 2008, exposure to intimate partner violence constituted 34% of cases of substantiated child maltreatment in Canada.<sup>1062</sup> Furthermore, 34% were cases of neglect, 9% were cases of emotional maltreatment, 20% were cases of physical abuse and 3% were cases of sexual abuse.<sup>1063</sup>

In 2008, the CIS began compiling data on investigations of risk of maltreatment whereas investigations of risk had not been compiled in the 1998 or 2003 incidence studies. On a case study review, researchers realized that social workers were reporting risk-only investigations of maltreatment as investigations involving incidents of alleged mistreatment.<sup>1064</sup> In recognition of this fact, researchers on the 2008 CIS reworked the CIS to take into consideration cases involving risk of maltreatment only and distinguishing them from substantiated maltreatment cases.<sup>1065</sup> It is important to be clear about how risk works in this situation. The CIS in fact distinguishes risk of harm to the child from risk of

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<sup>1061</sup> *Ibid.* See N Trocmé et al, *CIS-2008 : Study Methodology*, online: Canadian Child Welfare Research Portal <<http://cwrp.ca/infosheets/cis-2008-study-methodology>>.

<sup>1062</sup> *Ibid* at 30. It is also noteworthy, that in the private custody arena, recent research by Allen Bailey indicates that the men most likely to look for sole custody of children are male batterers:

Male batterers are more likely than nonabusive men to seek custody of their children. Because men have controlled most significant segments of societies in which they live, from government to religion and family structures, abusive men have a significant cultural advantage in litigating issues surrounding divorce and child custody, simply by virtue of their maleness. The legal system grants parents rights to custody of their children that often appear to be superior to their children's right to be safe. Abusive men, who are often articulate, manipulative, and persuasive, often prevail over their abuse victims in custody disputes, despite a lack of evidence that the women had parenting faults. More concerning is that some abusive men succeed in obtaining physical custody, even when there is credible evidence of the father's abuse of the mother and the children.

Allen Bailey, "Prioritizing Child Safety as the Prime Best-Interest Factor" (2013) 47 FLQ 35.

<sup>1063</sup> *Canadian Incidence Study of Reported Child Abuse and Neglect – 2008, ibid* at 30-31.

<sup>1064</sup> *Ibid* at 9.

<sup>1065</sup> *Ibid.*

maltreatment. Risk of harm continues to be included among substantiated maltreatment cases. Researchers provide the example of a toddler that is consistently left unsupervised and is therefore at risk of physical harm. On the other hand, risk of maltreatment, while included in cases of substantiated maltreatment in the 1998 and 2003 cycles, was collected separately for the 2008 cycle.<sup>1066</sup> The report explains what constitutes risk of maltreatment:

There can be confusion around the difference between risk of harm and risk of maltreatment. A child who has been placed at risk of harm has experienced an event that endangered her/his physical or emotional health. Placing a child at risk of harm is considered maltreatment. For example, neglect can be substantiated for an unsupervised toddler, regardless of whether or not harm occurs, because the parent is placing the child at substantial risk of harm. In contrast, risk of future maltreatment refers to situations where a specific incident of maltreatment has not yet occurred, but circumstances, for instance parental substance abuse, indicate that there is a significant risk that maltreatment could occur.<sup>1067</sup>

When looking at the concepts of risk of harm, maltreatment, and now, risk of maltreatment,<sup>1068</sup> we shift from a focus on actual acts in the family violence frame, to a focus on behaviours. The concept of risk works here to open up an examination of parental behaviour and to determine how this “risky” parental behaviour may constitute objective risk to the child. Psychiatric knowledge as to what constitutes the normal person and their behaviours and conversely, what constitutes the “abnormal” person and their behaviours is brought to bear in understanding these risks of maltreatment. The calculation of risk of maltreatment therefore requires a very particular set of professional expertise.

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<sup>1066</sup> *Ibid* at 15-16.

<sup>1067</sup> *Ibid*.

<sup>1068</sup> *Ibid* at 24. The CIS 2008 reported that 74% of all child welfare investigations were conducted because of a concern about a maltreatment incident that may have occurred, while 26% of all investigations were conducted because of this “risk of future maltreatment”. In those risk of future maltreatment investigations 17% were found to involve no risk of future maltreatment, 5% were found to have a risk of future maltreatment and in 4% the risk was “unknown”. In parsing out risk of future maltreatment from substantiated maltreatment, the CIS reveals that while 41% of investigations resulted in substantiated maltreatments, in reality only 36% were “substantiated” while 5% were based upon a finding of “risk of future maltreatment”.

Psychiatrists and psychologists perform a very particular role in the context of discovering and remediating child abuse and maltreatment. They indicate the likelihood of harm, the types of persons who are likely to harm, and the types of persons who are likely to suffer harm. In this way they are integral to predicting and understanding the consequences of risk of abuse and maltreatment.

Not only does the CIS collect data on substantiated cases involving risk of maltreatment, but it also collects information from children's aid agencies as to what risk factors may indicate those families in which there is a higher likelihood of finding cases of substantiated maltreatment. Risk factors are compiled on primary caregivers and on households in general. In terms of household risk factors, the 2008 CIS reports that the single greatest risk factor for households was the receipt of social assistance, employment insurance or other benefits, followed by one move in the last twelve months, followed by the presence of household hazards.<sup>1069</sup> Where a worker receives a referral to investigate a case of child abuse, the presence of any one of these risk factors, even before substantiating the maltreatment itself, will indicate to the worker that this family is a "higher risk" family and there is a greater likelihood that maltreatment has occurred.

Many of the families involved in the child protection system are lone-mother headed families which have been shown to be amongst the poorest families in Canada in general, and in Nova Scotia in particular.<sup>1070</sup> Some of these women have been victims of

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<sup>1069</sup> *Canadian Incidence Study of Reported Child Abuse and Neglect – 2008, ibid* at 5. The 2008 CIS found that the most frequently present risk factor for primary caregivers were: "being a victim of domestic violence (46%), having few social supports (39%), and having mental health issues (27%)." *Ibid.*

<sup>1070</sup> For 2011, Vanier Institute for the Family researchers found that female lone parent families comprised 21.2% of all persons with low incomes. The only other family types that were more likely to find themselves on a low income were couples either with (75.7%) or without (23.3%) children where there was no earner in the home. See Nathan Battams, Nora Spinks and Roger Sauvé, *The Current State of Canadian Family Finances* (Ottawa: The Vanier Institute for the Family, 2014) at Appendix B; Colin Dodds & Ronald Colman, *Income Distribution in Nova Scotia* (Halifax: GPI



family violence.<sup>1071</sup> Many families involved in the system are marginalized by the socio-economic problems of racism and poverty and find themselves suffering housing, food, medical and income insecurity. African Nova Scotian families, for example, are among the poorest families in Nova Scotia.<sup>1072</sup> Furthermore, aboriginal families are not only counted among Canada's most marginalized families, but these families are over-represented in the child protection system and have been since the inception of the system and the creation of residential schools.<sup>1073</sup>

Some families involved in the child protection system are suffering complex and interdependent problems of mental health and poverty. While persons with mental health issues have been shown to be among Canada's poorest citizens, poverty itself poses many health dangers, including mental health challenges such as depression and anxiety<sup>1074</sup> Single mothers, therefore, suffering from housing, food and income insecurity, are at a greater risk of suffering poor health and mental health because of their position of

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Atlantic, 2001) at 40-41, online: <<http://www.gpiatlantic.org/publications/abstracts/incdist-ab.htm>>.

Single mothers are four times more likely to live in poverty than two-parent families. The average income of single mother headed families living under the poverty line is \$10,000 below Statistics Canada's LICO poverty line. In Nova Scotia, 70% of Nova Scotian single mothers live below the LICO line. This is 50% higher than the male rate and the widest gap in the country.

<sup>1071</sup> Seven in 10 victims of family violence are women. See Statistics Canada, *Family Violence in Canada: A Statistical Profile* (Ottawa: Minister of Industry, 2011) at 13.

<sup>1072</sup> Nova Scotia, *Poverty Reduction Strategy* (Halifax: Province of Nova Scotia, 2009) available at <[http://www.gov.ns.ca/coms/specials/poverty/documents/poverty\\_report\\_2009.pdf](http://www.gov.ns.ca/coms/specials/poverty/documents/poverty_report_2009.pdf)>.

<sup>1073</sup> The CIS 2008 reports that "the rate of substantiated child maltreatment investigations was four times higher in Aboriginal child investigations than non-Aboriginal child investigations (49.69 per 1,000 Aboriginal children versus 11.85 per 1,000 non-Aboriginal children)." See *Canadian Incidence Study of Reported Child Abuse and Neglect – 2008*, supra note 910 at 39; Blackstock, *When Everything Matters*, supra note 909.

<sup>1074</sup> Canadian Mental Health Association, *Poverty and Mental Illness* (November 2007) online: CMHA <[https://ontario.cmha.ca/public\\_policy/poverty-and-mental-illness/](https://ontario.cmha.ca/public_policy/poverty-and-mental-illness/)>.

poverty.<sup>1075</sup> The Canadian Mental Health Association reports that “people with mental illness often live in poverty. Conversely, poverty can be a significant risk factor for poor physical and mental health.”<sup>1076</sup> CMHA reports that

[I]ndividuals with serious mental illness are frequently unable to access community services and supports due to stigma, gaps in service and/or challenges in system navigation. Lack of sufficient primary health care and community mental health services, shortages of affordable housing, and inadequate income support further alienate them from life in the community. Exclusion from these social and economic supports results in social isolation, significantly increasing their risk of chronic poverty.<sup>1077</sup>

Conversely, poverty can have a devastating effect on one’s quality of life, physical and mental health.<sup>1078</sup> CMHA reports that, “For persons who are poor and predisposed to mental illness, losing stabilizing resources such as income, employment, and housing, for an extended period of time can increase the risk factors for mental illness or relapse.”<sup>1079</sup>

Finally, problems of poverty and mental health have been shown to have a complex relationship with addiction. Families marginalized by social and economic problems have been shown to suffer from addictions and persons with mental health issues have been shown to be at greater risk for addiction problems.<sup>1080</sup> As Justice Carol Curtis has said of the litigants she has seen in the child protection system in Ontario:

The parents involved in child protection cases are unlike the parents involved in domestic family law cases. Many parents involved with the child protection system

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<sup>1075</sup> *Ibid* at 3. See also Dennis Raphael, *Poverty and Policy in Canada: Implications for Health and Quality of Life* (Toronto: Canadian Scholars’ Press Inc., 2007).

<sup>1076</sup> Canadian Mental Health Association, *supra* note 1074 at 1.

<sup>1077</sup> *Ibid* at 1-2.

<sup>1078</sup> Raphael, *Poverty and Policy*, *supra* note 1075.

<sup>1079</sup> Canadian Mental Health Association, *supra* note 1074 at 3.

<sup>1080</sup> “Tackling mental health and addictions issues is vital for the health of individuals, families, and communities. It is estimated that at least 60 per cent of individuals diagnosed with a mental illness also have addictions”: Registered Nurses Association of Ontario, *Creating Vibrant Communities* (January 2010) at 40, online: <http://rnao.ca/policy/reports/creating-vibrant-communities>.

struggle daily with chronic poverty, family violence, employment difficulties, intellectual limitations, and serious emotional problems. They are often from a dramatically different socioeconomic group than the judge, the lawyers, and the social workers in the case. They often have different values and a very different life experience. The impact of these differences cannot be over-stated.<sup>1081</sup>

In 2009, Dr. Cindy Blackstock published the results of her study comparing “the incidence and characteristics of child removal and reunification amongst First Nations and Non-Aboriginal children in Nova Scotia” between 2003 and 2005.<sup>1082</sup> The study included a sample of 103 non-Aboriginal children and 107 Aboriginal children who were removed from their homes by child and family services in these years in Nova Scotia. She found that First Nations children were removed from parental care 3.4 to 6 times more often than non-Aboriginal children in Nova Scotia between 2003 to 2005.<sup>1083</sup> Furthermore, she found that 95% of all children (both Aboriginal and non-Aboriginal) removed from their homes between 2003 to 2005 in Nova Scotia were from households where the total household income level was below \$25,000 a year.<sup>1084</sup> Only 3% of children from non-Aboriginal homes and 1% of children from Aboriginal homes came from households with incomes over \$40,000 a year. This is quite significant as the average household income in Nova Scotia across all industries in 2001 was \$46,000/year. Blackstock further found that 97% of all families in the study did not own their own home.<sup>1085</sup>

In Blackstock’s findings, the reasons for removal of the child and caregiver functioning at removal further reveal families suffering from complicated social and economic problems. Among non-Aboriginal children the three most common primary

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<sup>1081</sup> Curtis, “Limits of Parenting Capacity Assessments”, *supra* note 1034 at 2.

<sup>1082</sup> Blackstock, *When Everything Matters*, *supra* note 909 at 127.

<sup>1083</sup> *Ibid* at 194.

<sup>1084</sup> *Ibid* at 136.

<sup>1085</sup> *Ibid*.

reasons for removal were caregiver incapacity related to substance misuse at 24% of cases, followed by exposure to domestic violence at 15% of cases, following by risk of physical abuse at 11% of cases.<sup>1086</sup> Among Aboriginal children, the three most common primary reasons for removal of the child were caregiver incapacity related to substance misuse at 28% of cases, exposure to domestic violence at 16% of cases, and “other neglect” in 6% of cases.<sup>1087</sup> Blackstock reports that 91% of primary caregivers were female. With respect to primary caregiver functioning at removal, for non-Aboriginal parents, mental health concerns were the most prominent concerns at 17%, following by being a victim of domestic violence at 16%, and finally, alcohol abuse comprised 14% of caregiver concerns. Similarly, for Aboriginal families, the most frequent primary caregiver concern was alcohol abuse at 16%, followed by mental health concerns at 14%, following by being a victim of domestic violence at 12%.<sup>1088</sup>

The latest figures from the 2008 CIS reiterate both Curtis’s and Blackstock’s findings, reflecting the reality that most – if not all – of the families in which cases of child maltreatment<sup>1089</sup> were substantiated, suffered from one or several of these interlocking problems of poverty and disadvantage.<sup>1090</sup> The 2008 CIS found that 33% of households in which a case of substantiated child maltreatment was found received social assistance, employment insurance or other benefits.<sup>1091</sup> In 20% of all cases of substantiated

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<sup>1086</sup> *Ibid* at 143.

<sup>1087</sup> *Ibid* at 143 to 144.

<sup>1088</sup> *Ibid* at 155.

<sup>1089</sup> Child maltreatment comprises cases of harm or risk of harm similar to those grounds found at section 22 of the CFSA: physical harm, sexual harm, emotional harm, exposure to domestic violence and neglect.

<sup>1090</sup> *Canadian Incidence Study of Reported Child Abuse and Neglect – 2008*, *supra* note 910.

<sup>1091</sup> *Ibid* at 42.

maltreatment, the family had experienced one move in the last twelve months, and in 10% of cases the family had experienced two moves in the past year.<sup>1092</sup> In 12% of households the presence of at least one household hazard (ie., drugs or drug paraphernalia, unhealthy or unsafe living conditions, or accessible weapons) was found. Furthermore, 11% of households with a substantiated maltreatment were households in public housing units.<sup>1093</sup>

The picture of marginalization becomes even more complex when we look at the risk factors involving primary caregivers, compiled by the CIS from child protection worker interviews. The CIS indicates that 91% of primary caregivers of children for whom maltreatment was substantiated, were women.<sup>1094</sup> When we take into consideration the primary caregiver “risk factors”: “being a victim of domestic violence (46%), having few social supports (39%), having mental health issues (27%), alcohol abuse (21%), and drug or solvent abuse (17%)” we begin to see the type of mother that will be “red flagged” by risk assessment tools.<sup>1095</sup> When one combines primary caregiver risk factors with household risk factors we get a picture of a “high risk” family as a family marginalized by racism, sexism, family status, domestic violence, receipt of social assistance, social isolation, addiction, housing insecurity and mental health issues. The picture becomes even more complex when we consider that almost one half (44%) of all families in which a case of substantiated maltreatment was found, relied on either public housing or other public assistance.

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<sup>1092</sup> *Ibid* at 42.

<sup>1093</sup> *Ibid* at 43.

<sup>1094</sup> *Ibid* at 39.

<sup>1095</sup> *Ibid* at 41.

Finally, when one adds these sources of social, economic, physical and mental deprivation together with the deprivation of safety and security experienced by a victim of domestic violence – the number one primary caregiver risk factor at 46% - one gets a picture of extreme vulnerability and marginalization. It is unlikely that, without supports, a mother suffering housing, food and income insecurity will be able to remove herself to safety away from an intimate partner in order to provide safety for her child. While in the criminal law frame family violence is perpetrated by men against women, when we look at this same family through the child protection system, the mother who exposes her child to this abuse becomes the source of maltreatment or risk of maltreatment to the child.

Even though the families involved in the child protection system continue to be families in poverty, studies have shown that material supports comprise a very small portion of the overall budget of child and family services in Nova Scotia. For example, Blackstock's research revealed that material supports to parents at the time of child removal, in the form of food bank referrals, shelter supports and low-income housing services accounted for less than 1% of all service referrals for both Aboriginal and non-Aboriginal families from 2003-2005.<sup>1096</sup> By far the most common service provide to both Aboriginal and non-Aboriginal parents at the time of child removal was supervised visits: 14% for non-Aboriginal and 13% for Aboriginal families.<sup>1097</sup> The second most popular service for non-Aboriginal parents at the time of their child's removal from their care was parent education courses at 11% of services provided, followed by "other family/parent support" at 9% of services provided. Blackstock reports that capacity assessments were the most common type of "other family/parent support" provided to parents. With respect to Aboriginal parents at the time of child removal, the second most common support service

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<sup>1096</sup> Blackstock, *When Everything Matters*, *supra* note 909 at 159.

<sup>1097</sup> *Ibid.*

provided was in home parenting support at 11% of overall services, followed by substance misuse assessment services (not treatment) at 9% of overall services provided.<sup>1098</sup>

Despite the fact that 95% of families in Blackstock's study made incomes under \$25,000,<sup>1099</sup> social assistance support was provided to 2% of non-Aboriginal families, and employment training, education services, food bank services and shelter services were so negligible as to fail to reach 1% of overall services provided to the parent.<sup>1100</sup> For Aboriginal families at the time of removal, the only difference in services was that 4% of Aboriginal families were receiving social assistance services.<sup>1101</sup> Even for children, Blackstock found that a non-Aboriginal child in care was far more likely than either aboriginal or non-aboriginal children reunited with parents to receive services.<sup>1102</sup>

A family attempting to make ends meet at under \$25,000 a year, faced with the difficulty of paying expenses and attempting to meet their needs of daily living, require income and housing maintenance services in order to be able to meet an acceptable standard of living. When compared against Statistics Canada's Market Basket Measure threshold for Nova Scotia, 2003-2005 (ie., \$29,204 in Halifax),<sup>1103</sup> a yearly income of \$25,000 would not cover a family's daily needs.<sup>1104</sup> Instead of housing and income

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<sup>1098</sup> *Ibid.*

<sup>1099</sup> *Ibid.*

<sup>1100</sup> *Ibid.*

<sup>1101</sup> *Ibid.*

<sup>1102</sup> *Ibid.*

<sup>1103</sup> Statistics Canada, Market Basket Measure Thresholds (2011-base) for reference family of two adults and two children, by MBM region, Table 4, online: Statistics Canada <<http://www.statcan.gc.ca/pub/75f0002m/2013002/tbl/tblo4-eng.htm>>.

<sup>1104</sup> The Market Basket Measure or MBM is a benchmark for measuring low income developed by Human Resources Development Canada and is in widespread use in Canada. The MBM is meant to provide more of an absolute or concrete indication of living conditions and as such the threshold amount represents the cost of a 'basket' of essential goods and services. The following are the MBM

maintenance services, however, supervision, education and assessments are often perceived by parents to be intrusive, extending the scope of surveillance over the family. Further, supervision, education and assessments all require the parent to be in contact with agency personnel or assessors who are compiling data for the agency on parental behavior that can be relied upon during adjudication of the child protection application.

While the CFSA was meant to promote family autonomy and integrity in the best interests of the child in the next section I will show that the jurisprudence has interpreted the Act so as to reinforce a residual model of child protection and justify a coercive engagement with families in poverty. By focusing on risk-based grounds of harm and relying heavily upon parental capacity assessments and other risk-based assessment tools, Courts are legitimizing a focus on parental deficit as the basis of risk to children. This not only obscures the effects of socio-economic marginalization on parents and children, but it serves to reinforce the idea that it is parents, not poverty and marginalization that are the real source of risks to children. Rather than testing the need for state intervention this focus on parental, and most often, maternal deficit, constructs state intervention into the often functionally mother-headed family as presumptively beneficial to children.

### **Judicial Interpretation of Risk of Harm to the Child**

Pursuant to the CFSA, respect for the integrity of the family requires that the agency must prove at the protection hearing on a balance of probabilities that the child is in need of protective services. Without proof of these grounds the judge must dismiss the application and the agency must cease intervention in the family unless the family agrees

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thresholds for Nova Scotia for a family of four, in Halifax, for the years 2003 to 2005: \$27,749 (2003); \$28,372 (2004); \$29,204 (2005). *Ibid.*



to voluntary services.<sup>1105</sup> If, on the other hand, the family refuses services and the agency maintains that there is a need to remain involved due to harm or risk of harm to the child, the agency must bring another application as evidence accumulates. It is only once a judge has found a child to be in need of protective services that she can move onto the disposition hearings which use the less exacting test of “best interests of the child”. At this stage even the most coercive of state interventions may be warranted – the child may be removed permanently from parental care. The following excerpt from D.A. Rollie Thompson’s annotated CFSA explains the fundamental difference between the protection and disposition proceedings:

The finding is directed to proof of harm or risk of harm to the child, based upon past acts and conditions, a task suitable to adjudication and application of the conventional rules of evidence. By contrast, once a finding is made, the disposition stage is fundamentally predictive, the issues are broader and more person-oriented, and there are strong reasons to relax evidence rules as in private custody cases. The formal separation of the hearings allows the Court to adopt a more relaxed evidence regime on disposition, while avoiding dangers and potential prejudice of such relaxed rules at the protection hearing proper.<sup>1106</sup>

The finding stage which grounds the legitimacy of coercive state intervention into the family is meant to test the presence of the harms or risk of harms itemized in section 22 of the CFSA. Following Wald’s formulation, the grounds were meant to be objective, evidence based grounds that would remove judicial bias and moralized value judgments from determinations as to the legitimacy of state intervention.

Substantial risk of harm is defined in the Act at s. 22(1) as a, “real chance of danger that is apparent on the evidence”. This is an exacting standard and is in line with Wald’s requirement that objective harm to the child must be shown in order to ground the legitimacy of state intervention. Investigation of parental conduct becomes central to a determination of risk-focused grounds because the presence of risk in a child’s life in the

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<sup>1105</sup> (1985), 45 NSR (2d) 361 at para 20.

<sup>1106</sup> Thompson, *The Annotated Children and Family Services Act*, *supra* note 842 at 167.

child protection context is so often evaluated in terms of that parental conduct. Expert psychological evidence, for example, is often used to give courts an idea of the underlying pathology behind parental conduct, and in this way gives the court an idea of possible risks that may be present for the child. As Wald noted, however, prediction based upon this psychological evidence is not always credible. Therefore, Wald suggested that where there had been no actual physical harm to the child and the evaluation is wholly risk focused, the standard to be applied should be that of “substantial and imminent” risk the child will be harmed:

When the child has actually suffered injury as a result of inadequate supervision, the proposed standard is the same as that applied in abuse cases. However, when no injury has occurred, the proposed standard requires that the risk be substantial and imminent. These terms should limit the dangers inherent in allowing intervention based on prediction of harm. Of course, such terms are subject to interpretation. They may well be expanded to include situations in which I would reject intervention. However, the proposed language does place restraints on court actions and informs the court and welfare workers of legislative policy. It forces an agency bringing a neglect case to court to prove the future likelihood of specific types of injuries. Combined with adequate procedural changes, the proposed standard should substantially limit inappropriate intervention.<sup>1107</sup>

However, contrary to Wald’s assertion that “parental ‘inadequacy’ in and of itself should not be a basis for intervention, other than the offer of services available on a truly voluntary basis,”<sup>1108</sup> jurisprudence in Nova Scotia has interpreted the category of substantial risk at s. 22(1) of the Act as a ground of intervention that invites an analysis of parental inadequacy. Take, for example, the following statement by Wilson Fam. Ct. J. in *Children’s Aid Society of Pictou County v. A.J.G.*<sup>1109</sup>:

Children are at risk and in need of protection when parenting is not “good enough” to protect them from harm. The courts have consistently stated that

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<sup>1107</sup> Wald, “State Intervention on Behalf of “Neglected”, *supra* note 912 at 1014.

<sup>1108</sup> *Ibid* at 1022.

<sup>1109</sup> 2009 NSFC 26 [hereinafter AJG].

authorities do not have to wait for actual harm to occur before intervening. Children are at risk when parents lack the basic skills to provide a stable and secure environment. Conversely, children are not at risk if parents can protect them from harm by providing a stable and nurturing home even though they may fall short of optimal parenting.<sup>1110</sup>

Even though Wald warned that determining what is “good enough” parenting is so vague that it will invite endless intervention, risk-focused grounds of harm serve to focus adjudication on parental behaviour as opposed to actual harm to the child.

As the CIS evidence above indicates, much substantiated maltreatment is founded not upon actual cases of harm to the child, but upon the presence of a risk of harm to the child. As discussed above, allegations of risk are more amenable to proof by psychiatric and psychological evidence such as Parenting Capacity Assessments and Child Abuse Potential Inventory tools. The result of risk-based allegations of harm and psychiatric evidence to establish this harm is that a tremendous amount of evidence is focused on the parent and not necessarily on the effects to the child.

Furthermore as Blackstock’s study of child protection work has shown, supervision, parenting education and parenting capacity assessments are the most common services provided to non-Aboriginal parents at the time of child removal. All of these services require the parent to be in contact with agency personnel or assessors. They require that personnel keep accounts of parental behavior during the provision of these services. Agency staff keep detailed notes of parental behavior during supervised access visits. Staff providing parenting education and budgeting classes keep notes of parental attendance at these sessions. And after several meetings with parents, capacity assessors have compiled a detailed account of parental behavior with the child, as well as accounts of any difficulties experienced by the parent including mental health and substance abuse issues. By the time the 90-day protection hearing has been completed and then the 180-

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<sup>1110</sup> AJG at para 54.

day disposition hearing, a great amount of evidence on parental conduct and behavior has been compiled during the provision of these services.

In setting out the basis of the protection application, agents often plead a number of risk-based grounds of apprehension. Because of the need for quick interim hearings, a low threshold test at these hearings (ie., the 5-day and 30-day hearings) means there is not a rigorous scrutinizing of state intervention at the outset of the protection application. This means that parents will almost inevitably be drawn into protection proceedings that will last at least three months until the protection hearing. In these three months, the agency will be compiling evidence from the services provided, from medical and counselling professionals the parent may be required to meet with, and from professionals, family and neighbours with whom the parents and children have had contact. Mounds of information on parental indiscretions, such as throwing parties, keeping unclean households, stories of financial mismanagement, shift the focus of adjudication onto to parental fault and away from the child and the child's needs. Furthermore, as Justice Carol Curtis has pointed out, the use of experts by the agency builds a case against the parents that they are unlikely to be able to challenge with their own workers:

There is never a level playing field for parents when the agency hires experts, as provincial legal aid plans generally do not fund private assessments for parents, or at least, do not fund them at the same level or frequency as the agency. Also, even if a full assessment were properly funded for the parents, parents cannot get sufficient access or any access to their children to permit an expert to conduct an assessment that includes the children.<sup>1111</sup>

This means that unless courts are vigilant in demanding that the agency focus its evidence of objective harm or substantial risk of harm to the child, a great amount of opportunity exists for a close scrutiny of parental conduct and potentially unwarranted and intrusive value judgements that presume the beneficence of state intervention.

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<sup>1111</sup> Curtis, "Limits of Parenting Capacity Assessments", *supra* note 1034 at 8.

The following review of the case law will look at examples of how allegations of maltreatment are substantiated in the jurisprudence in Nova Scotia. I focus mainly on issues of neglect, emotional harm and exposure to domestic violence as these are the most commonly cited cases of maltreatment as found by the CIS data results, and because they are particularly reliant upon psychiatric and parenting capacity evidence as well as being grounds of intervention which so obviously intersect with gendered, classed, raced and ableist social relations. This is not to say that emotional harm, exposure to domestic violence and neglect are the only grounds that serve to focus attention on parental behaviour. I focus in particular on risk of emotional harm, exposure to domestic violence and neglect, however, because they are often adjudicated without focusing on how these grounds of harm actually effect the child. Combined with the propensity of the agency to prove these grounds with psychiatric and capacity assessment evidence, these grounds in particular evidence how a risk-focus is capable of obscuring the social relations of race, gender, class and disability in constructing the mother as a risk to her child.

An example of how risk-based grounds can serve to focus attention on parental deficit and away from actual harm to the child is the case of *Nova Scotia (Minister of Community Services) v. J.G.B.*<sup>1112</sup> One of the issues under appeal in that case was that the appellant mother alleged that the trial judge, Williams J., failed to show actual harm to the child when he found that the children were in need of protective services pursuant to s. 22(2)(g) of the Act. Section 22(2)(g) states that a child will be found in need of protective services where:

there is a substantial risk that the child will suffer emotional harm of the kind described in clause (f), and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm.

Clause (f) provides:

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<sup>1112</sup> [2002] NSJ No 295 [hereinafter JGB].

(f) the child has suffered emotional harm, demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour and the child's parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

The trial judge had made this finding largely on the basis of the condition of the home and the mother's failure to take responsibility to mitigate the poor living conditions of the children. The evidence in the decision dealt extensively with these issues and with the behaviour of the mother and her boyfriend. There was no information about the children suffering from emotional or physical harm. Further, notes from the workers indicated that "A.K.G.C. and D.B. appeared healthy and happy."<sup>1113</sup> The trial judge explained his protection finding by stating that,

This is not about financial poverty. The cleanliness and hygiene issues that have been documented relate to a poverty of responsibility. What this case is about is an exceptionally immature young mother, a young couple with two very young children who have repeatedly been exposed to neglectful circumstances."<sup>1114</sup>

While the court noted the presence of arguing and some domestic violence in the home, the children were not ultimately apprehended on this basis. The appellant mother argued that the Act and the grounds of protection listed at s. 22(2) necessitated that the "court must draw the connection between the neglect and the resulting risk of harm"<sup>1115</sup> and that the judge could not apprehend solely on the condition of the home. In this case, the judge found "episodic neglect" the appellant argued, but the Agency had failed to show that the children suffered "severe anxiety, depression, withdrawal or self-destructive or aggressive behaviour." She argued that "a finding of need of protection based solely on 'neglect' or lack of parental fitness is no longer permissible under the Act," and that "some

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<sup>1113</sup> *Ibid* at para 21.

<sup>1114</sup> *Ibid* at para. 25.

<sup>1115</sup> *Ibid* at para. 37.

evidence concerning the future risks to the children’s mental health was essential to draw the inference from neglect to”<sup>1116</sup> the harms listed at s. 22(2)(g).

The Court of Appeal dismissed the appeal. In particular, the Court held that the judge had not misapprehended s. 22(2)(g) of the Act. The Court began its explanation of why it did not accept this ground of appeal by noting that “As of August 16, 2000, the appellant consented to a finding that the children were in need of protective services based on the substantial risk of emotional harm as defined in the Act.”<sup>1117</sup> The Court then went on to characterize the appellant’s argument as stating that, “expert evidence in this area was needed”.<sup>1118</sup> The court held that:

The nature of that evidence was sufficient to enable him to draw the inference, as he did, that there was a substantial risk of emotional harm as defined in the Act. I would reject the notion that expert evidence was a prerequisite to make the connection between bad parenting and the risk of emotional harm in this case.<sup>1119</sup>

The Court reviewed the evidence that lead to the finding, including the fact that the children were found in unacceptable living conditions; that the children were bonded with their mother but this did not offset the risk that was presented to them by the conditions of the home; that there was filth and inadequate nutrition in the home; that there were unkept visits to doctors; and that there were arguments in front of the children.<sup>1120</sup> The Court held that, “In the face of all the evidence of neglect, an experienced trial judge must

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<sup>1116</sup> *Ibid* at para 37.

<sup>1117</sup> *Ibid* at para 39. In setting out first that the mother consented to the protection stage, the court seemed to be intimating that this is proof of the existence of the grounds pleaded in the protection affidavit even though the Court has held in *BLC* that this is not necessarily the case. See *Nova Scotia (Minister of Community Services) v BLC*, [2007] NSJ No 164.

<sup>1118</sup> *Ibid* at para 42.

<sup>1119</sup> *Ibid*.

<sup>1120</sup> *Ibid* at para 43.

be permitted to draw the obvious inference of risk of harm as defined in the Act. To require more would require actual occurrence of harm.”<sup>1121</sup>

Although the Court held that, “The Act does not require that bad parenting go on until the damage is done,” what the Court failed to address was the fact that nowhere did either level of Court satisfy the condition at s. 22(2)(f) that the children were exhibiting depression or anxiety. And further, the Court did not address the fact that there was no evidence that the conditions of the home would inevitably lead to such harm. The Court of Appeal took it for granted that poor living conditions would lead to a maladjusted child and therefore upheld the decision based on this risk. The precedent that this sets for intervention into the homes of marginalized families is staggering. As Wald pointed out, it means that intervention could potentially be limitless. Of course children in marginalized families will not get the opportunities that more privileged children will get and of course they will suffer the effects of poverty. But choosing for the child protection regime the function of separating those children from their parents on the basis of that poverty is not only in effect punishing marginalized families for their poverty, but as Wald suggested, it will mean that these “happy and healthy” children who are bonded to their mother will now be subject to the harm of being removed from their parents and put in the system. It is difficult to see how envisioning such a role for the child protection system is being done in the best interests of marginalized children.

The case of *Children’s Aid Society of Halifax v. H.A.*,<sup>1122</sup> provides another example of factors that can be attributed to social and economic exclusion which are depicted in agency evidence – and adjudicated upon by the Court – as risks posed by the parent or guardian to the child. H.A. involved the case of a single mother arrived in Nova Scotia with

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<sup>1121</sup> *Ibid.*

<sup>1122</sup> 2002 NSCA 94, 29 RFL (5<sup>th</sup>) 247 [hereinafter, HA].



two children under a Women at Risk program run by the United Church. The children were suffering post-traumatic stress from their experience in Somalia and had language difficulties. Furthermore, the family was Muslim living in Sydney, with no Muslim community. The family eventually moved to Halifax to be in the Somali community there. The family came to the attention of the Agency, first as a result of a referral from the school, and then as the result of a referral from the IWK. One of the children alleged that he was sexually and physically assaulted at school. Doctors did an examination and found no medical evidence to support the allegations but noted that the family appeared to be under “significant emotional distress at the time.”<sup>1123</sup> The children attended at a new school and again there were allegations of sexual and physical abuse. Staff at immigration settlement services contacted the Agency about the allegations. It appears that several days later the police were contacted by the family who again spoke of the sexual assault allegations and the police contacted the Agency. There was what the Court referred to as an “a horrible example of an apprehension gone wrong” on December 3<sup>rd</sup> and then the children were hospitalized.

While at the hospital the children were evaluated and the following was provided in the doctor’s report:

Of interest, the children, on presentation to hospital and during the entire admission, had no abnormalities in their gait or walk. There were no physical complaints and when they began eating, within that first day of admission, there were no problems with digestion. Psychiatry was consulted and attempted to assess the children. This was limited as F. declared that she and her brother would not be talking to the physician. Our understanding of the children's emotional disturbance is also limited by our lack of understanding of their previous life experience, and the short time of observation. The children require long term assessment.

The overall concerns for the children is (sic) the highly suspicious nature which they and their caretakers demonstrate, which has significantly impacted their life functioning. The repeated allegations and unusual thought processes which the children have repeated in hospital are outside of usual childhood experience and comprehension. There is concern that ... these thoughts have been imposed upon

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<sup>1123</sup> *Ibid* at para 13.

them or perpetuated by their caretakers. This appears to have led to significant emotional distress to these children, and, as mentioned, they were exhibiting physical signs, such as refusal to walk, and walking with a wide-based gait in the past. They are also refusing to go to school as they believe they will be beaten and raped at every school that they attend. They are certainly hyper-vigilant and very parentified in their behaviors. They have absolute mistrust of anyone with whom they come in contact.<sup>1124</sup> [emphasis added]

Examination indicated that the children were acting in a “hypervigilant” manner, were suspicious and scared. The doctor indicated that the thought processes of the children were “outside of the usual childhood experience and comprehension”. While this hypervigilance and suspicion might be outside the usual childhood experience of children born and raised in Nova Scotia, this might not be the case for children who have come as refugees to a foreign place from a war-torn country. At no point does it appear that the children or the caregiver were assessed by a doctor specializing in the health of refugee persons or specialized in PTSD in children from war torn countries. The psychiatrist who did diagnose the children considered that there were several diagnostic possibilities, recognizing in several respects that their status as refugees might be impacting on their mental health:

Several diagnostic possibilities need however to be considered. It may be that the children suffer from an imposed disorder (Shared Psychotic Disorder - 297.3), a disorder where individuals in very close relationship to an individual with a delusional disorder share that disorder and have delusions similar in content. In such cases, the disorder remits over time if the individual is removed from the influence of the primarily affected individual.

Another possibility is that F. and A.'s mother and aunt have reacted to the children's reporting of events in school and elsewhere, interpreting what has been said in a particular way. It is possible that prior experiences may lead them to accept possibilities that others might find highly improbable. One wonders if the children were extremely uncomfortable in school perhaps because of anxiety over their academic skills in relation to their classmates or because of separation issues.

Finally, the possibility that the children have been persistently abused in a serial fashion requires to be investigated no matter how improbable this may seem to be.<sup>1125</sup>

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<sup>1124</sup> *Ibid* at para 23.

<sup>1125</sup> *Ibid* at para 24.

The Agency argued that the children were in need of protection on the basis of sections 22(2)(f), (g), and (h) – emotional harm, risk of emotional harm, and suffering of a mental, emotional or developmental condition and the parent refuses to alleviate the condition.<sup>1126</sup> Justice Gass found that the children were at risk and ordered their removal to the Dayspring Children’s Center. In her decision she stated the following:

There does appear, however, to be evidence of substantial risk of emotional harm and I conclude that there is a real danger apparent on the evidence of substantial risk of emotional harm and although actual emotional harm was not pleaded, I would go so far as to suggest that there actually has been evidenced by the manner in which these children have escalated and behaved, and I am not considering what has happened since the taking into care because I think what has happened since the taking into care to some extent is attributable to the actual taking into care and not the emotional harm that has resulted for whatever reasons, many of which are still unknown to these children where they have been extremely anxious. They have been very aggressive. They have taken on the aura of someone who has been injured in a significant way. They have been isolated and removed from their society and the normal interaction with other children and certainly I am satisfied that all of those elements do support a finding of substantial risk of emotional harm apparent on the face of the evidence.

As well I am satisfied under subsection [h] that the children do suffer from an emotional condition that if not remedied can seriously impair the children's development and the parents are unable to consent to services or treatment to alleviate that condition. What that emotional condition is, is unknown but it is clear from the evidence that there is an emotional condition there which if not addressed would impair their ability to grow into happy, healthy children, young adults and adults and certainly on the basis of the evidence, I am satisfied that the children are in need of protective services.<sup>1127</sup>

While it is clear from the judge’s decision that the children suffer from emotional harm, it is unclear what caused this harm, what services were offered their caregiver to alleviate this harm, and how the caregiver failed to protect the children from harm. In fact, what is clear is that the actual taking into care caused harm and escalation, but the decision is unclear as to why the children could not be protected in their guardian’s care.

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<sup>1126</sup> *Ibid* at para 27.

<sup>1127</sup> *Ibid* at para 28.

While the guardian appealed on sufficiency of evidence and on the basis that the judge did not explain why the children could not be protected in her care, the Court of Appeal dismissed the appeal. The following are the substantive portions of the appeal Court's short judgment from Cromwell J.A.:

The judge had abundant evidence to support her conclusion respecting emotional harm and risk of emotional harm. This included evidence of the children's extremely anxious behaviour as reflected in the repeated and escalating allegations of abuse, their taking on the aura of children injured and unwell, an aura unsupported by the medical evidence, their reports of unsubstantiated medical conditions and their prolonged absence from school. The evidence showed that the appellant appeared incapable of addressing this situation in an appropriate manner and indeed proposed to return the children to one of the schools in which the alleged abuse had been perpetrated. The record makes it obvious, in my respectful view, that these children are very troubled and at serious risk. The fact that the depth of the trouble in combination with the appellant's conduct made more precise definition of the trouble impossible up to the time of the hearing does not, in my view, take away from the palpable risk of emotional harm evidenced in the record.

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The appellant submits that the judge failed to consider various provisions of the Act, particularly several clauses of its preamble, that state in various ways and in various contexts that the integrity of the family and the use of the least intrusive means are foundation principles of intervention under the Act.

In my respectful view, the judge did not fail to consider these principles to the appropriate extent. She expressly referred to the preamble of the Act, noting that children should be removed from parental care only when all other measures are inappropriate. Moreover, the determination of whether the child is need of protective services is primarily a factual matter focussed on the determination of whether the grounds of intervention listed in s. 22(2) of the Act have been established. The judge addressed herself to this inquiry and in doing so, she did not, in my opinion, fail in her statutory duties under the Act.<sup>1128</sup>

The judge at points refers to the difficulties of these children, but these aspects of harm – socio, cultural and economic deprivation – are not accounted for in judicial reasoning at either the trial or appellate level. Consequently, there is a failure to contextualize the children's situation and their problems and a failure to contextualize what is required to maintain the family's integrity and autonomy in this case. Instead, the

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<sup>1128</sup> *Ibid* at paras 32-36.

case law details how children have suffered emotional harm and how the caregiver is unable on her own to protect the children, which on the facts is quite plainly true. What the decision doesn't tell us, however, is how to accommodate the emotional, social, cultural, racial, political or economic toll that this family is and has suffered and exactly what options are open to the caregiver to remediate this suffering. Nor does the decision tell us what it must mean to remove the children from their guardian in this case. What we see here is a court faced with a family suffering marginalization at the intersection of racism, religious prejudice, mental illness and poverty, and the court attempts to fit these aspects of inequality into justiciable concepts of harm and risk of harm.

Another example of how the interpretation of the grounds finding a "child in need of protective services" has opened up the grounds of intervention to scrutinize parental conduct can be seen in the case of *Nova Scotia (Minister of Community Services) v. F.M.*<sup>1129</sup> While the reported decision involves the final disposition of the case, the judge spends a considerable amount of time determining if the child remains in need of protective services. The continuing need for protective services is not tied to any one particular ground of intervention, however, it is instructive to review the factors that the judge considered in determining that the children remained in need of protective services. In this case there is a noticeable lack of emphasis on the effects of parental conduct on the children. Instead, as will be shown, all considerations of whether the children remained in need of protective services centered around their mother's conduct.

In *F.M.*, Milner Fam. Ct. J. began by noting that the evidence that led the children to be apprehended consisted of evidence showing "the mother failed to adequately care for the children, as shown by the unclean premises, the presence of younger children

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<sup>1129</sup> [2008] NSJ No 443.

hanging out in her apartment, the drinking of herself and friends, and her son's extensive rash."<sup>1130</sup> The judge noted that the mother did not seem focused on the children during supervised access and was not convinced by the mother's explanation that she felt nervous "because she was being watched." He noted that she had little support from her extended family and did not find persuasive evidence from an aunt that the mother's circumstances had improved.

Justice Milner noted that the mother had addiction issues with drugs and alcohol and did not find the mother's evidence credible that she had stopped drinking and using drugs. Supporting his decision that the mother's evidence was not credible, the judge stated, "she said that the social workers, the police, and the photographic evidence had been wrongly interpreted in suggesting that her apartment had been smeared with feces. She insisted on cross examination that it had be chocolate, left over from Easter."<sup>1131</sup> Because Milner Fam. Ct. J. did not believe this evidence he was unable to believe evidence that she had her addictions under control. Under the heading of "Parental Capacity Assessment", however, and not under the "Addictions" heading, Milner noted that, "psychological testing suggests that she does not have an alcohol abuse problem."<sup>1132</sup>

The trial judge went on to further examine the mother's mental health, noting that she was diagnosed with depression and ADHD but that she would not take her depression medication because it made her sick. He opined that, "It is quite likely that she will continue to minimize the importance of appropriate mental health care in the future, with a potential risk to the children if living in her care."<sup>1133</sup> He further stated, "ADHD, by its

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<sup>1130</sup> *Ibid* at para 38.

<sup>1131</sup> *Ibid* at para 47.

<sup>1132</sup> *Ibid* at para 58.

<sup>1133</sup> *Ibid* at para 50.

nature, would also likely present complications for the mother if the children were to be living in her care”.<sup>1134</sup> It is noteworthy that neither statement as to her mental health or projections of her mental health was supported by evidence from a mental health practitioner or other human services expert.

Justice Milner then reviewed the mother’s past criminal activity. He noted that she was serving a sentence which included house arrest but that she had not always complied with her sentence. He noted, “In failing to comply with her sentence, she seems to have little insight into the seriousness of criminal activity. This is cause for concern for the future well-being of any children in her care, especially where her criminal record includes violence.”<sup>1135</sup> Finally, Milner Fam. Ct. J. reviewed the mother’s Parental Capacity Assessment and placed considerable weight on the mother’s “Child Abuse Potential Inventory” results. The following excerpt was reproduced from the Parental Capacity Assessment Evaluative Summary:

The Child Abuse Potential Inventory is a screening tool used to detect physical child abuse. [F.]’s Total Abuse Score fell well above the cut off criteria, and so suggests that she has personal characteristics similar to known physical child abusers, and so, evidences a high risk to physically abuse her children, especially when stressed.<sup>1136</sup>

While this decision is not a protection finding decision, it is a decision where the judge has gone extensively through the mother’s issues in order to determine if the children are still in need of protective services. After having reviewed all these areas of concern with regard to the mother’s behaviour, the judge stated that the children would be at substantial risk of physical harm. Nowhere, however, does the judge ever consider the children or any evidence relating to how the children are functioning or whether there has

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<sup>1134</sup> *Ibid* at para 51.

<sup>1135</sup> *Ibid* at para 54.

<sup>1136</sup> *Ibid* at para 59.

been any physical harm of the children in the past, aside from a rash that was observed on one of the children. Although he had evidence from a psychologist stating that the mother did not have addiction issues and evidence from an aunt that the mother's living situation had improved, he refused to accept this evidence and instead found that the mother's conduct, including her lack of insight into her depression and the presence of ADHD, posed a risk of physical harm to the children.

Not only are the grounds at section 22, especially, grounds involving risk, interpreted so as to focus on parental conduct as opposed to the effect of the ground of harm on the child, but once a parent has been determined to be "risky", this finding with respect to one child will be used to show risk to another child, even a newborn whom the parent has not even had a chance to parent. In the case of *Nova Scotia (Minister of Community Services) v. J.F.*<sup>1137</sup> for example, the child, M.D.M. was apprehended at birth based upon the mother's past parenting practices which saw a previous child of hers put in care. In particular, the Agency alleged that the child was in need of protection based upon sections 22(2)(b), (g), (j), (ja) and (k) of the Act. In 2002, the Halifax Regional Police contacted the Agency with a referral for J.F.'s first child, C., that included allegations that J.F. was living out of her car at one point with a child and was now in an apartment with no electrical power.<sup>1138</sup> The police indicated to the Agency that the apartment where the mother and child were staying was "in complete disarray", there were "deplorable living conditions" and the child was hungry.<sup>1139</sup> When the agency worker attended at the apartment to investigate, she interviewed the child who indicated that his bed was in the hall on the floor

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<sup>1137</sup> 2004 NSSF 79, NSJ No 358.

<sup>1138</sup> *Ibid* at para 3.

<sup>1139</sup> *Ibid*.



and consisted of “some clothes lying on the floor with a pillow at one end.”<sup>1140</sup> The child, C., also told the worker that he had eaten two sandwiches the day before consisting of ketchup and onions and that he had eaten nothing else that day. Ultimately the parents agreed to a finding on the basis of s. 22(2)(k) – that the child has been abandoned.

Due to the protection finding the child was taken into the temporary care of the Agency and the mother was provided with services including both a psychological assessment and then a psychiatric assessment and a parental capacity assessment by a therapist with expertise in assessing parental capacity. While the psychologist and psychiatrist did not find that the mother had a formal psychiatric disorder, the psychiatrist found that she operated at a very immature level. In particular, he found:

What I did find was an individual who seems to have a lot of the evidence that one would expect to see from a background of trauma and neglect. There are problems of sleep, appetite, emotional disconnectedness, easily switching states, inability to soothe oneself, and almost child-like belief about many things about the world.

It is my opinion that J.F. probably should be thought of as being developmentally delayed in an emotional sense, and that she has not really grown up emotionally. She seems to be unable to take the position for instance of her son, to assess danger towards him, and actually seems to impose on him her own peculiar belief systems. Part of this is being emotionally disconnected, and making judgements from somewhat individual distinct states of mind.<sup>1141</sup>

Meanwhile, the parental capacity assessor found that the parents “were capable of meeting [the child’s] physical, emotional and educational needs throughout this visit”, however, he also found that given the mother’s immaturity, she would be unable to parent in the long term:

...In many ways J.F. is still emotionally, behaviourally and cognitively behaving like a very young adolescent. It is as if the developmental maturity was stunted at a young age and has never been allowed to fully develop. This does create a significant problem as these issues are extremely difficult to treat and progress is often years in the making. As a result, C.J.F. would presently remain at risk if he

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<sup>1140</sup> *Ibid* at para 5.

<sup>1141</sup> *Ibid* at para 17.

were returned to his Mother's care, unless she was supervised on a constant basis. J.F. is clearly capable of providing the necessary care on a short term basis, but appears to lack the psychological maturity to provide the long-term consistency that is required.<sup>1142</sup>

Finally, a child and family therapist assessed the child, C., finding him to be “a very bright and naturally creative little boy who lacks self-confidence and obviously has a great need for addressing his personal security needs.”<sup>1143</sup> The parental capacity assessor was concerned with the family therapist’s evaluation that the child lacked stability and pointed to this instability in his evaluation of the mother’s parental capacity. In his report he concluded: “I am very concerned that this child will continue to experience the same degree of instability if returned to his mother at this time.”<sup>1144</sup> As a result of these assessments the child remained in care until his biological father contacted the Agency and expressed a desire to parent the child. The mother had notified numerous professionals, however, that the father had been “extremely abusive (primarily to her)”. Regardless, the Agency placed the child with the father and terminated their proceedings, finding this was the least intrusive intervention. The mother’s second child, born in 2003, was apprehended at birth based upon this history.

Here we have a single mother disadvantaged by a history of trauma and poverty, who continued to suffer from mental health issues, and issues of poverty including housing, food and income insecurity. A number of assessments were conducted and it was concluded that this situation of multiple and intersection personal, social and economic problems were the result of the mother’s immaturity and her inability to ensure stability in the child’s life such. These problems were adjudicated upon as grounds of risk of harm to the child and substantiated: the child was found to be in need of protection. While the

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<sup>1142</sup> *Ibid* at para 18.

<sup>1143</sup> *Ibid* at para 19.

<sup>1144</sup> *Ibid* at para 22.

mother had notified “numerous professionals” that she had experienced family violence as the hands of the child’s biological father, a home study of the father was prepared and no risk was found to the child. The judge found that the “least intrusive intervention” at this point was to remove the child from the mother’s care and to provide the mother’s former abusive partner with custody.<sup>1145</sup> Based on these circumstances the mother’s second child was taken into care at birth on the basis of sections 22(2)(b), (e), (g), (ja) and (k).<sup>1146</sup>

What is obfuscated in this case is the history of family violence experienced by the mother at the hands of the child’s biological father, as well as the history of trauma that led the psychiatrist to diagnose the mother as having experienced a history of “trauma and neglect”. Furthermore, nowhere in the decision is there a discussion of how poverty has contributed to this child being found to live in a situation of “instability”. Rather, the only conclusion one can draw from the text of the decision is that the mother’s “immaturity”

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<sup>1145</sup> *Ibid* at para 23.

<sup>1146</sup> At the final disposition hearing for the mother’s second child, the court found that even though the mother had improved – getting into a more stable relationship with a man, attending all sessions with a family skills worker and attending all supervised access visits – she would not be able to improve sufficiently to parent the child by the terminal time lines set out in the Act. In finally disposing of the application, Smith J held:

**69** I am satisfied that J.F. is psychologically immature and that on a balance of probabilities this has affected her ability to care for her children. J.F. has the basic skills necessary to parent (this is evident from the notes of the individuals that supervised J.F.'s access with M.D.M.). The issue is whether she is mature enough to parent M. on a long-term basis including the inevitable periods in her life when she will undergo stress. J.F. herself notes that a number of stressful events had occurred in her life around the time that C.J.F. was found to be in such poor living conditions and was taken into care. The question is whether she has now developed to the point that she will be able to properly care for M.D.M. even in times of stress....

**71** The opinions of the experts that J.F. has therapeutic issues which require long term treatment, that she has not yet reached the level of psychological maturity necessary to provide the long-term care for a child, her previous lack of commitment towards undergoing therapy and her inability (until the last number of months) to exercise access with M.D.M. on a committed basis all lead me to conclude that the circumstances that supported the initial finding that M.D.M. was in need of protective services have not changed to such an extent that it would be appropriate to return M.D.M. to his mother's care.

has placed the child at risk.

It is not only risk-based grounds of harm alone, however, that can obfuscate the effects of socio-economic marginalization on the lives of children and their families. We see the same pattern of obfuscation in the case of *Nova Scotia (Minister of Community Services) v. A.S.*<sup>1147</sup> a case involving exposure to domestic violence which involved two young children under the age of three. Judge Niedermayer provided a concise summary of the facts of the case leading to the children being found to be in need of protective services under sections 22(2)(b), (f), (g), and (i) of the Act, including grounds of exposure to domestic violence, emotional harm and risk of emotional harm:

**5** In very summary form these are the facts: the Respondent, A.S., is a young lady who comes from an extremely abusive family situation where both her father and her brothers physically abused her; her brothers sexually abused her; and, there is documentation showing a dysfunctional family unit from which she is a survivor. She has had apparently three known relationships with males, all of whom have been abusive, the last being the Respondent, M.W., who, it has been suggested, has been the most physically and emotionally abusive of the three persons involved in her life.

...

**7** The evidence from the office of the Department of Community Services as collated and put together by Gail Vandermeullen indicates a history, since the birth of the older child, of the Respondent's either inability or refusal to meaningfully deal with relationship issues and parenting problems, both of which have apparently had an observed detrimental effect upon the older child, R. Presumably, if it were to continue, it would have the same effect on the younger child. To date the younger child has not yet been specifically affected by the Respondent's circumstances.

Counsel for the mother argued at the protection hearing that the mother was no longer living with respondent M.W. and had terminated their relationship, and as such the children were not at risk of harm nor in need of protection. Judge Niedermayer dismissed counsel's argument, saying instead that the mother's inability to comprehend her vulnerability to resume an abusive relationship placed the children at risk:

**13** It is my opinion, based upon the evidence which I have heard and that which I have read, that the lack of comprehension by the mother as to her own vulnerability to resume an abusive relationship, the lack of comprehension by her

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<sup>1147</sup> (1995) 144 NSR (2d) 71, 57 ACWS (3d) 454.

for the need of therapy and counselling for her own personal development and parental abilities, is a key and integral factor in determining whether or not she can adequately protect her children and remedy or alleviate the harm to which they are exposed. The failure of A.S. to accept responsibility for her own failures and to deal with services needed for rehabilitation is a major cause of finding these children to be in need of protective services. Her denial of the extent of abuse which she and the children have suffered; her sometimes expressed and sometimes implied denial of responsibility for her own short-comings; the projection of blame on others; her denial of appropriate knowledge of parenting; and, her failure to nurture, comfort and protect the child are significant factors. They continue to this day. [emphasis added]

The trial judge took notice of evidence from the psychiatrist that women who are abused can be “numbed by the abuse... this numbing and depression, common to abused women, may lessen their availability to their children for guidance and emotional support, and even for the physical well-being.”<sup>1148</sup> Judge Niedermayer therefore found that “until she can become an independent person who can operate with an independent mind, she will be unable to protect these children.”<sup>1149</sup>

Therefore, the mother, as victim of spousal abuse – evidencing what a psychiatrist depicted as a “normal” coping mechanism to the abuse – was in fact depicted as the cause of risk to children. The judge was unconcerned with the reality of the present situation that the mother had removed herself from the abusive relationship and the abuser was no longer living in the house. Instead, the Court depicted the mother as having a dependent and pathological personality which would find her back in the arms of her abuser. The real source of risk to the children was not the presence of an abuser and the limitations of our justice and welfare systems to adequately address and remediate family violence, but the mother’s status as the type of woman who was “vulnerable” to getting into abusive relationships.

As the evidence above indicates, marginalized children are faced with a myriad of

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<sup>1148</sup> *Ibid* at para 14.

<sup>1149</sup> *Ibid* at para 15.

risks which are the result of personal, social and economic marginalization. By pulling back from scrutinizing the context of the “risks” and accepting expert evidence of risk as solely the result of parental deficit, the jurisprudence helps to naturalize a connection between parental deficit and risks to children and obscures the way that social and economic marginalization both contribute to these deficits and themselves pose risks to children from marginalized families.

In the next section I will show how, by failing to actually contextualize the “risks” to children and to question how the services provided by the Agency – often in the form of psychiatric and psychological services – are capable of assisting in remediating that risk, the jurisprudence is in effect validating the effectiveness of these services to eliminate risk to the children. Many judges simply evaluate whether or not the Agency provided “services” to the family and whether the family was not able to remediate their problems in the time allotted. This validation serves to legitimize the provision of services such as agency supervision, parenting education classes and parental capacity assessments, as capable of remedying risks to children. Without scrutinizing these services, attention is shifted away from social and economic risks to the child and focused on parental deficit and a lack of parental responsibility as the real source of risks to children in marginalized families. When social and economic marginalization are adjudicated upon as risks to children for which parents are solely responsible, even intrusive intervention into families in poverty are presumed to be in the best interests of children. In the next section I will explore how the treatment of services and time lines in cases deciding CFSA cases has prevented the court from thoroughly scrutinizing the nature of state intervention into the family.

## **Justifying Services under the Residual Model of Child Protection**

Once the agency has justified intervention into the private sphere of the family by showing at the protection stage that, on a balance of probabilities the child is in need of protective services, the proceedings can then turn to the “disposition stage”. It is at this stage where the judge can make child placement orders in accordance with a determination of the best interests of the child. Pursuant to s. 42 of the Act, the disposition orders available to the Court include: a supervision order; temporary custody orders; and permanent care and custody orders. Further, the Court may dismiss the matter if it is found that the child is no longer in need of protective services and it is in the best interests of the child to do so.<sup>1150</sup>

A permanent care and custody order is the most intrusive disposition order the Court can make. This section will focus on the making of a permanent care and custody order and the considerations that were included in the Act to ensure that such an order will be made in line with the least intrusive intervention standard. Furthermore, the bulk of reported child protection decisions in Nova Scotia are the result of permanent care and custody hearings and therefore, they comprise an important part of child protection jurisprudence.

The permanent care order can sever parental ties to a child indefinitely, effectively making the state the child’s parent<sup>1151</sup>, and thus it engages greater scrutiny by the Court than either the supervision or temporary care orders. The intent of the permanent care and custody order is “to recognize and ensure that if parents are not willing or able to make and carry out a plan to address the child’s need for stability and permanency planning the

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<sup>1150</sup> Section 42(1)(a).

<sup>1151</sup> Section 47(1)

agency needs to.”<sup>1152</sup> The ultimate goal of many permanent care and custody orders is permanency planning, often in the form of adoption.<sup>1153</sup> As the making of a permanent care and custody order so fundamentally relinquishes decision-making over a child to the state, the Act includes a number of provisions to ensure that this decision was being made as a last resort and that state intrusion was justified. For example, sections 42(2), (3), and (4) place an onus on the Court to more thoroughly question the Agency as to the need for removal. However, as will be discussed, judicial interpretation of some of these conditions, particularly, provision of services and placement with relatives, has served to undermine the court’s ability to thoroughly scrutinize the need for and nature of intervention into the family.

Pursuant to s. 42(2), “the Court shall not make an order removing the child from the care of the parent or guardian unless the Court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to section 13,” have been tried and failed; refused; or would be inadequate to protect the child. As part of the least intrusive intervention model, the Act as enacted in 1991 promised to be a service-focused act. As described by Prof. Thompson in his Annotation:

Just as the [CSA] substituted the more neutral “child in need of protection” for the former fault-oriented “neglected child”, so too the new Act demonstrates a slight shift in emphasis, using the Alberta phrase “child in need of protective services”. A child in these situations needs not “protection” from parents, but the child and his or family require the provision of “protective services”, with a view to maintaining the family intact or reuniting the family. In this sense, the very language reinforces the very service orientation of the new act.<sup>1154</sup>

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Singled out for mention here are the voluntary services to promote the integrity of the family of section 13, services which should in most cases have been offered or

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<sup>1152</sup> Kristina Reitmeier, *Fundamentals of Child Protection Proceedings: Part III: The Dispositional Stage* (NJI Conference, Ottawa, Sept 2002) at 8.

<sup>1153</sup> *Ibid.*

<sup>1154</sup> Thompson, *The Annotated Children and Family Services Act*, *supra* note 842 at 39.



considered before reaching the disposition stage. The mandatory language of section 13 – “the Minister and the agency shall take reasonable measures to provide services...” – is reinforced at this point in the proceedings. Absent convincing proof of inadequacy under clause (c), a failure to prove past efforts under clauses (a) or (b) [of 42(2)] would mean the Court must opt in favour of a supervision order under s. 42(1)(b), with terms and conditions to include the services identified.<sup>1155</sup>

Integral to the new model of least intrusive intervention was the idea that services – particularly voluntary services – would be provided to promote family autonomy. This provision of services is consonant with the child welfare philosophy that had been developing since the post-war years that preventive casework was necessary to keep the marginalized family together. This preventive casework necessarily entailed the provision of services, including hard services such as housing, income maintenance and child care supports.<sup>1156</sup> Furthermore, the provision of services is integrally important for families in poverty. The fact that a parent is in poverty and simply cannot access services does not accord with the liberal view of family privacy. Without parents being able to choose whether or not to protect the child, state intervention into these families appears immediately coercive and counter to the rule of law. The provision of services is integral to bringing state intervention in line with the liberal rule of law as it ensures that parents who are not remediating deficits can in fact be shown to be the source of harm to their children, justifying state intrusion into the private sphere of the family. The least intrusive intervention philosophy requires, then, that the state provide services sufficient to alleviate harm to children. Only when the parent chooses not to accept such services, or where appropriate services have been provided but the parent is still unable to parent, should the state step in coercively.

Since the enactment of the Act in 1991, however, the courts have not interpreted the scope of sections 13 and 42(2) in a broad and liberal manner. The courts have rather

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<sup>1155</sup> *Ibid* at 198.

<sup>1156</sup> See CFSA, ss 13(1)(a), (b), (h).

provided a narrow interpretation of the Agency's obligations under the section and at the same time have chosen to focus on parental responsibility to obtain services in a consideration under s. 42(2). Furthermore, the appellate courts have undermined their own judicial ability to scrutinize and order services in the best interests of the child. The lack of an effective service regime is most evident when we look at cases in which social problems such as poverty, racism and gendered oppression come into play. In so many cases the services offered are in the nature of soft services such as counselling, budgeting advice and therapy. Further, it is expected that these services must remedy the "problem" within the time lines as set out at s. 45(1) of the Act. When we are dealing with a family marginalized by poverty, racism, sexism and family status (ie., single mothers), it soon becomes clear how ineffective these services are and therefore how formalistic the idea of providing for family autonomy through such services.

### **The Interconnection of Services and Time Lines**

The leading case on provision of services from the Court of Appeal is *Nova Scotia (Minister of Community Services) v. L.L.P. et al.*<sup>1157</sup> In this case the parents argued that the trial judge committed a reversible error in not considering that the Minister failed to discharge its obligation to provide them with adequate services to support the family. The Court dismissed the parents' appeal and refused to comment on the level of deference to be given to Agency decision-making with respect to services. What the Court did address explicitly in *L.L.P.* was the scope of Ministerial provision of services:

The goal of services is not to address the parents' deficiencies in isolation, but to serve the children's needs by equipping the parents to fulfill their role in order that the family remain intact. Any service-based measure intended to preserve or

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<sup>1157</sup> 2003 NSCA 1.

reunite the family unit, must be one which can effect acceptable change within the limited time permitted by the Act.<sup>1158</sup>

The Court went on to provide guidance as to the appropriate scope of the Agency's duty to provide services. At para. 38, the Court cited the following statements by Niedermayer J.F.C. in *Nova Scotia (Minister of Community Services) v. L.S.* with approval:

As counsel for the Minister has pointed out, it is not mandatory for the Minister to provide all of the services enumerated in Section 13 but "shall take reasonable measures" to provide services. "Reasonable measures", in the context, means the agency must identify, provide or refer to the services and there has to be a reasonable probability of success in the provision of service...<sup>1159</sup>

With the citation of these paragraphs from *L.S.* and the failure to strongly assert that the agency has a duty to provide services in accordance with the "service-oriented" focus of the Act, the Court of Appeal gave a cue to the lower Courts on the extent of the obligation of the agency to provide services. This duty may be discharged, for example, by simply, "giving the parent the names and locations of these 'out of house' services; payment for the cost of transportation to and from the services, if such was necessary; making referrals and setting up initial appointments where appropriate; and, advising the parent of alternatives, when needed."<sup>1160</sup> Very little was said about the provision of income maintenance services or housing – services which so many families in need require in order to bring their living conditions up to an acceptable standard. Furthermore, judges often cite the principle from *L.L.P.* quoted above, that "Any service-based measure intended to preserve or reunite the family unit, must be one which can effect acceptable change within the limited time permitted by the Act."<sup>1161</sup> While time lines were initially introduced into child protection

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<sup>1158</sup> *Ibid* at para 25.

<sup>1159</sup> (1994), 130 NSR (2d) 193 (FamCt) [hereinafter, *LS*].

<sup>1160</sup> *LPP* at para 38, citing *LS*.

<sup>1161</sup> *Ibid* at para 25. See for example, *Family and Children's Services of Lunenburg County v GD*, 2003 NSCA 123; *Family and Children's Services of Annapolis County v JD*, 2004 NSFC 1; *MS v Children's Aid Society of Inverness-Richmond*, 2005 NSCA 78; *Nova Scotia (Minister of*

legislation to ensure that the best interests of the child were being provided for and that state intervention in the family was limited, a failure to scrutinize the sufficiency of services while upholding a strict adherence to these time lines has ended up depriving some families of a meaningful chance to remediate complex and deep-seated problems and has conversely relieved the state of the responsibility to provide services to address these problems.

The time limits set out in the CFSA are provided in recognition of the principle, set out in the Preamble, that: “children have a sense of time that is different from that of adults and services provided pursuant to this Act and proceedings taken pursuant to it must respect the child’s sense of time.” As such, the Act contains a number of time limits to ensure that there is not undue delay in child protection proceedings as outlined above: the 5- and 30-day interim hearings, 90-day protection hearing and 180-day initial disposition hearing. Further, the CFSA sets out terminal time limits at section 43(4) and 45(1) of the Act which dictate when the Court’s jurisdiction over a matter terminates. Section 43(4) provides that a supervision order must not extend beyond twelve months from the judge’s original disposition decision making the order. With respect to temporary care and custody orders, the total duration of all orders is twelve months for children under six years of age and eighteen months for children six and over.<sup>1162</sup> The end of the terminal time limit is the point at which a Court must make an order for permanent care and custody or dismiss the matter.<sup>1163</sup>

The importance of taking into consideration the child’s sense of time was affirmed by the Supreme Court in *(M.)C.* at para. 44:

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*Community Services) v EC*, 2007 NSSC 37; *Children’s Aid Society of Cape Breton-Victoria v LD*, 2010 NSCA 20.

<sup>1162</sup> CFSA, s 45(1).

<sup>1163</sup> See *Children’s Aid Society of Halifax v TB*, [2001] NSJ No 225.

The passage of time in matters of child custody and welfare over extended periods may, unfortunately, carry a heavy burden for all concerned. This is recognized by the Act in that a number of provisions mandate the timely resolution of cases and impose time limits on Children's Aid Society involvement with a family. In particular, s. 70(1), earlier reproduced, provides that proceedings under the *Act* should be completed within a two-year period. In the case at hand, Macdonald J. clearly turned her mind to this concern when she stated:

In this case, the intention of the *CFSA* and in particular section 70 have clearly been violated. Had section 70 been adhered to, the psychological bonding that has occurred between [S.M.] and her foster home would not have occurred to the extent that it has.

My comments about the violation of s. 70 are not a criticism of any of the parties; it is a comment on the lethargy of the legal process which, unfortunately in this case, has thwarted the intentions of the *CFSA*.

I share Macdonald's J.'s concerns with regard to the importance of reaching a speedy resolution of matters affecting children. The *Act* requires it and common sense dictates it. A few months in the life of a child, as compared to that of adults, may acquire great significance. Years go by crystallizing situations that become irreversible.<sup>1164</sup>

Furthermore, the Act recognizes that a child's sense of time is different depending on their age in instituting different time limits for temporary care orders for children under six years of age and over six years of age. Time limits must be short enough that children do not bond too strongly with foster parents, lose their attachment to their biological parents or remain in limbo too long; but they also must be long enough to allow families to remediate difficulties using the services provided them by the Agency. However, because of the inability of a static time limit to accommodate every eventuality or situation in a protection proceeding, soon after the instituting of the Act judges began to experience difficulties with the time limits under the Act. Several earlier cases decided under the *CFSA*, however, indicated a willingness to be flexible on time limits as long as the abrogation of such limits were in the best interest of the child.

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<sup>1164</sup> *Catholic Children's Aid Society of Metropolitan Toronto v CM*, [1994] SCJ No 37 at para 44.

For example, in the case of *Family and Children's Services of Annapolis County v. A.M.*,<sup>1165</sup> Levy J. commented on how “the issue of time frames under the Act has been the cause of no end of problems for the Family Court bench and for counsel.”<sup>1166</sup> In the case before him Levy Fam. Ct. J. was bound by the time limits at s. 41(1) of the Act which provides that the Court has 90 days from the finding to hold a hearing and make a disposition order. However, the Court required evidence from a *viva voce* hearing which could only be obtained by way of transcripts. The preparation of the transcript meant that the Court would have to adjourn and extend the matter past the time limits set out at s. 41(1) of the Act. In deciding whether or not the time limits at s. 41(1) were mandatory, Levy Fam. Ct. J. turned his attention to the difficulties that the time limits posed for the family Court:

That which has been put in place to serve the best interests of children has come close to being their master. They have caused havoc with our ability to control our dockets. They routinely require that other cases, no less important to parties or children because they are not under this Act, to be bumped, often at the last minute. It is not outside my experience that we have been obliged to proceed without important reports or witnesses because the time frames apparently gave the Court no option. One is left to wonder how much damage to the best interests of children or to the integrity of the family is done in the name of these time frames.<sup>1167</sup> [emphasis added]

Judge Levy found that the time limit established by s. 41(1) of the Act, while mandatory, could be extended in the best interests of the child. As the best interests of the child principle is the “governing consideration of the legislation,” where there was a

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<sup>1165</sup> [1996] NSJ No 331.

<sup>1166</sup> *Ibid*, at para 25.

<sup>1167</sup> *Ibid*, at para 25.

conflict between adhering to the time limits and to the best interests of the children, the best interests of the children must prevail.<sup>1168</sup>

The Court of appeal subsequently adopted Levy Fam. Ct. J.'s reasoning and held that the time limits in the Act could be extended in the best interests of the child. In the case of *Children's Aid Society and Family Services of Colchester County v. H.W.*<sup>1169</sup> the Court of Appeal dealt with the time limit contained at s. 41(1) of the Act, wherein the Court is directed to hold a disposition hearing and render a decision ninety days after a child is found to be in need of protective services. The appellant appealed on the basis that the trial judge had lost jurisdiction over the child protection proceedings when he delivered his decision more than six months after the main disposition hearing. The judge held that, "the time frame had been extended because he re-opened the hearing on two occasions to receive additional evidence and hear submissions respecting it."<sup>1170</sup> The disposition hearing had been held at the end of the 90-day time limit which left no time to hear submissions or evidence. The parties therefore agreed to extend the time limits, however, the question still remained whether the judge had lost jurisdiction in taking 6 months to release a decision.

The Court of Appeal held that in this case if the judge had lost jurisdiction over the matter, after the child had been found to be in need of protection, this would not have been in the child's best interests. The Court held that:

[A] proper interpretation of the time limits contained in the [Act], the object of eliminating the excessive time delays experienced under the previous legislation can best be attained not at the expense of the paramount consideration but by giving the best interests of children their fullest and broadest effect.<sup>1171</sup>

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<sup>1168</sup> *Ibid*, at para 48.

<sup>1169</sup> [1996] NSJ No 511.

<sup>1170</sup> *Ibid* at para 3.

<sup>1171</sup> *Ibid* at para 27.

This means that when the time limits set out in the Act conflict with the best interests of the child, the best interests of the child are to take precedence. The Court held that it would “consider the time limits to be not mandatory but strongly directory to be obeyed to the fullest extent possible consistent with the best interests of the child.”<sup>1172</sup> The Court therefore held that in this case, as the judge had found that an extension of the time limits was in the best interests of the child, he did not lose jurisdiction over the matter. While he was in error of law in holding that s. 8 of the *Family Court Act* allowed him six months to render a decision, he would not lose jurisdiction over the matter. The Court noted that mere consent of counsel cannot extend the time limits, but it must also be found that such an extension would be in the child’s best interests.

While these cases were some of the first to interpret how the time limits set out in the new CFSA were to act, in appellate jurisprudence over the past decade, however, we see a more rigid insistence on time lines, particularly as they concern the ability of a judge to order services or to promote greater agency responsibility for the family. In the case *B.F.*,<sup>1173</sup> for example, Chief Judge Comeau was attempting to provide as much support as possible to an aboriginal family marginalized by poverty and disability, in order that they would not lose their children because of their disadvantaged situation. The Court of Appeal decision upholding the appeal of his ruling exemplifies the difficulty of applying a strict adherence to time lines in the context of families marginalized by complex and interlocking personal, social and economic disadvantage.

The case of *B.F.* involved an aboriginal family marginalized by the effects of poverty and disability. The four children of the family were found to be in need of protection mainly

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<sup>1172</sup> *Ibid* at para 30.

<sup>1173</sup> *Nova Scotia (Minister of Community Services) v BF*, [2003] NSJ No 405 at para 22 [hereinafter, BF].



because of issues stemming from neglect including the condition of the home, hygiene and poor stimulation. The children were found to be suffering a myriad of developmental problems. A supervision order was made at that time under s. 40 and then affirmed again at disposition on May 21, 2002. On May 5, 2003 at a review hearing, Chief Judge Comeau rejected the Agency's plan for permanent care and custody and ordered that the supervision order continue past the time limit for supervision orders at s. 43(4) of the Act. The order was to be in place for six months after which the Agency's application would be dismissed. He also ordered that a staff person employed by the Agency would assist the family full-time to provide a safe and healthy environment for the family; provide healthy nutritional meals; maintain proper hygiene; to jointly make decisions; and to acquire parenting skills and techniques.<sup>1174</sup> The Agency appealed Chief Judge Comeau's decision on the basis that he erred by extending the time limit at s. 43(4) and by ordering the Agency to provide services not approved by the Agency.<sup>1175</sup>

In allowing the Agency's appeal, the Court rejected the trial judge's use of the Court's holding in *H.W.* as grounding his authority to extend the time limits. Chief Judge Comeau held that pursuant to *H.W.* he could extend the time limits at s. 43(4) in the best interest of the child. He held that, "The Court finds as a fact that the time limits as to dispositions set out in s. 45 conflict with the best interests of the children which has been identified as support for the family unit more particularly discussed earlier."<sup>1176</sup> Chief Judge Comeau therefore held that he was not bound by the time limits in the Act and made the order for supervision discussed above as he felt it was in the best interests of the children from this very marginalized family to be given the opportunity to remain in the family. A substantive

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<sup>1174</sup> *Ibid* at para 48.

<sup>1175</sup> *Ibid* at para 46

<sup>1176</sup> *Ibid* at para 52

provision of services such as support with health meals, hygiene and a “safe and healthy environment” was what he determined was required to maintain the integrity of the family. The Court of Appeal held that this was an error in legal principle; the principle that a time line could be extended in the child’s best interests did not apply “to a time limit which governs the contents of the order after the trial.”<sup>1177</sup>

The Court of Appeal in *B.F.* first justified this decision by pointing to the mandatory language contained at s. 43(4) of the Act, that “in no case shall a supervision order or orders extend beyond twelve consecutive months of supervision” and holding that the consequence of this language was that no supervision order shall extend past the limit.<sup>1178</sup> Even though Chief Judge Comeau ruled that the paramount consideration of the child’s best interests necessitated an extension of the time line at s. 43(4) the Court rejected Chief Judge Comeau’s ruling as violating the strict time lines set out in the Act.

The Court of appeal went on to explain why it rejected Chief Judge Comeau’s interpretation of *H.W.* with reference to the principles behind the Act and behind the Agency’s provision of services as laid down in *L.L.P.* The Court held that the words of s. 43(4) had to be understood in the context of the Act. In this case, as held in *L.L.P.*, the Court affirmed that the purpose of the Act and of the provision of services in the Act was to provide parents with services to equip them to parent “within the limited time permitted by the Act.”<sup>1179</sup> The Court quoted with approval the holding from *L.L.P.* that, “The Act does not contemplate that the Agency shore up the family indefinitely.”<sup>1180</sup> The Court went on

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<sup>1177</sup> *Ibid* at para 58

<sup>1178</sup> *Ibid* at para 60

<sup>1179</sup> *Ibid* at para 65.

<sup>1180</sup> *Ibid.*

to cite with approval the holding from *L.L.P.*,<sup>1181</sup> that, “The Act is designed to assist families in performing their role as effective, nurturing parents. In my view, it should not be interpreted in such a way as to require the child welfare authorities to assume the primary parenting role in order to maintain the children in their home at all costs.”<sup>1182</sup> The Court held therefore that, “From these passages it is clear that the maximum time periods to be written in disposition orders are not “directory” items. They are important components of the scheme of the object of the Act and the intention of the legislature as discussed in *L.L.P.*”<sup>1183</sup>

While the Court held that Chief Judge Comeau erred by failing to take into consideration the objective of the Act, that “the Act does not contemplate that the Agency ‘shore up’ or act as a surrogate parent indefinitely,” his order for supervision was not one for indefinite intervention. Indeed, his order extended the time limits in the best interests of the child for a definite period of six months. He held that when the six months were up, the Agency’s application would be dismissed and therefore Agency involvement would be at an end. This is far from the Court of Appeal’s interpretation that Chief Judge Comeau was ordering the Agency to shore up the family indefinitely. As directed in *A.M.*, he made a determination in the child’s best interests to extend the time line and he did so in a constrained manner and not in an open-ended fashion. The time lines under the Act are set in place to respect the child’s sense of time. As Chief Judge Comeau points out in his decision, the children have never been separated from their parents so extending the order

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<sup>1181</sup> Citing from *Children’s Aid Society of Metropolitan Toronto v TC* [1995] OJ No 1634.

<sup>1182</sup> BF at para 65.

<sup>1183</sup> *Ibid* at para 66.

should not interfere with the child's sense of time – an issue the Court of appeal plainly misses in its decision.<sup>1184</sup>

So what was the Court of Appeal really objecting to in *B.F.*? Chief Judge Comeau did not want to “shore up the family indefinitely,” he only wanted to extend the supervision order by six months in the best interests of the child. While the case relies in part on a strict adherence to the time lines provided by the Act, in the name of adhering to the child's sense of time, this strict adherence to the guidelines in effect restricts the decision-making of trial judges in favour of a deference to agency decision-making, including the provision of services to families. In *B.F.*, Comeau C.J. had the benefit of hearing from the parents and the agency and he nonetheless made an order that he determined was in the best interests of the child. The child had never been out of the home, and yet, a strict adherence to the time lines resulted in the child being removed permanently from the home and from the care of his parents. While time lines are meant to respect the child's sense of time in the abstract, a rigid adherence risks orders that are in fact counter to the best interests of the child at hand. Furthermore, curtailing the ability of judges to scrutinize services in an era which has witnessed the scaling back of the social welfare state fails to provide for a rigorous testing of state intervention in the best interests of children. Instead, soft services such as supervision, education and capacity assessments are expected to remediate problems in the short time provided. This not only serves to relieve the state of the responsibility to provide material supports for families in poverty much it serves to reinforce the idea that parental deficit is responsible for the risks facing children from marginalized families.

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<sup>1184</sup> *Ibid* at para 67. The court holds that Chief Judge Comeau's comments in this regard are “a distinction without a difference.”

### **Failure to Scrutinize the Adequacy of Services**

The decision handed down by the Court of Appeal in *Children's Aid Society of Halifax v. L.A.G.*,<sup>1185</sup> exemplifies how the “soft” service focus of the child protection work can fail to address issues of housing and income insecurity faced by so many families involved in the child protection system. The result is the removal of children from a home suffering economic deprivation, despite the existence of bonding and attachment between mother and child. In *L.A.G.*, the trial judge found the child to be in need of protective services pursuant to s. 22(2)(k) as the judge held that the mother was unable to provide the basic necessities for the child such as adequate living conditions. The judge also held that the child was in need of protective services pursuant to ss. 22(2)(j) and s. 22(2)(ja) [harm from neglect and risk of harm from neglect]. The principal reason for the apprehension had been the condition of the home. The trial judge ordered the child to be placed in the permanent care and custody of the Agency. The mother appealed the decision on the basis that the trial judge erred in misrepresenting the services contemplated by the Act and in ruling that the mother did not identify services that could have been provided to her.<sup>1186</sup>

The mother argued that “it was her impecunious state which contributed to her inability to service her rent and utilities”<sup>1187</sup> which resulted in the finding that she was unable to provide sustained care for her child. She argued that the trial judge misapprehended this fact when he stated that “Ms. [G.] has repeatedly not paid rent or

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<sup>1185</sup> [2005] NSJ 512 [hereinafter, LAG].

<sup>1186</sup> *Ibid* at para 14.

<sup>1187</sup> *Ibid* at para 19.

power. She has effectively refused the most basic of services.”<sup>1188</sup> The mother argued that the Agency never offered her these services. Further, had the mother been offered these services, she argued that she would not have refused them. The only services the mother was offered from the Agency included parenting courses, an assessment report, counseling for gambling, and a family skills course.

The mother, therefore, was essentially attempting to appeal the decision on the basis that the Agency had not fulfilled its duty to provide her appropriate services. The Court of Appeal dismissed the mother’s appeal, holding that the judge correctly cited the appropriate legal principles dealing with the Agency’s duty to provide services as laid down in *L.L.P.* and that he had not misapprehended the evidence. It was open to the trial judge to find that the mother was refusing to maintain a household at an acceptable level for the child and that there were no services that would help the mother to pay rent. The trial judge had found that the mother was unable to find the “personal discipline to pay rent, power or maintain a household” and no service would assist her to do so.<sup>1189</sup> He found that “She is connected to and uses community resources...She has had private counseling. None of these services has impacted upon Ms. [G.] so as to enable her to create sustained change.”<sup>1190</sup>

Not only does providing counseling and parenting courses fail to address the poor standard of living which is keeping children in vulnerable positions, but an insistence on providing these services shifts the focus to parental behaviour as opposed to the effects of the social problem of class and poverty. The mother in *L.A.G.* was a single mother suffering from the effects of poverty. By providing her with counseling and parenting courses and

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<sup>1188</sup> *Ibid* at para 18.

<sup>1189</sup> *Ibid* at para 23.

<sup>1190</sup> *Ibid* at para 22.

then noting that she was still not paying her rent or power leads to the conclusion that it is a personal failing of hers that is leading to her impecunious state. In this case it was the mother's lack of personal discipline and lack of insight into her refusal to pay rent and power that posed a risk to the child.

*Children's Aid Society of Cape Breton-Victoria v. A.L.*<sup>1191</sup> is a further example of how the provision of services – totally inadequate to address ingrained social problems – can perpetuate the idea that it is parental conduct which created the risk to the child. In *A.L.* the child was found to be in need of protective services primarily because of concerns regarding exposure to domestic violence. While the mother was originally under a supervision order, the Agency took the children into temporary care and custody after the mother's boyfriend assaulted her once more. The Agency's position was that "the mother was repeating a pattern of engaging in personal relationships with violent men, which created a substantial risk of physical harm for the children."<sup>1192</sup> The Agency sought a permanent care and custody order with no access to the mother. The mother's position was that she no longer had contact with the boyfriend that assaulted her, and that she was making significant strides in her personal life such as attending counseling for her addiction to prescription drugs and holding a full-time job. She asserted that some of her difficulties came from her financial circumstances which made her rely on the boyfriend who assaulted her.

The judge allowed the Agency's application for permanent care and custody and denied access to the mother. The judge held that her recent conduct in getting her life together and in staying away from violent persons "was too little too late" as the time limits

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<sup>1191</sup> [2010] NSJ No 274.

<sup>1192</sup> *Ibid* at para 29.

had expired.<sup>1193</sup> The trial judge held that the mother was a victim of domestic violence and that “her actions throughout the proceedings have demonstrated that she puts herself in harm’s way and is not forthcoming in reporting incidents of domestic violence in a timely manner.”<sup>1194</sup> While the judge had found that there was a close bond between mother and one of the children and that she “had the capacity to meet her children’s physical, mental and emotional needs”, her inability to stay away from domestic violence put her children at risk.<sup>1195</sup>

What is so troubling about this case, beside the fact that it “blames the victim” for her problems and thereby hides the nature of gendered power relations that give rise to domestic violence, is that the mother had accessed all the services provided her by the Agency to no avail. While the mother appeared to have her substance abuse under control through attending services it appeared that there was no amount of services that would provide her with the “insight”, or in other words, sense of responsibility, necessary to get her to stop putting herself in situations where she would be abused. As the Agency argued at trial:

the domestic violence risk factors which led the children to be in need of protective services continue to exist, the services that have been implemented to alleviate the risk have failed and the circumstances giving rise to the risk are unlikely to change within a reasonable foreseeable time-frame based on the ages of the children.<sup>1196</sup>

Providing the mother with counseling services while failing to recognize that the mother was experiencing financial difficulties which lead her to be dependent on the man that assaulted her, meant that the “soft” services provided her would be totally ineffective.

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<sup>1193</sup> *Ibid* at para 65.

<sup>1194</sup> *Ibid* at para 65.

<sup>1195</sup> *Ibid* at para 66.

<sup>1196</sup> *Ibid* at para 48.



In providing the mother with counseling services, the causation for the problem of domestic violence was laid squarely at her feet. The provision of counseling services helped to perpetuate the narrative that the mother's inability to keep away from abusive men and her inability to take responsibility for herself and her child, were the cause of her abuse and the risk to her child.<sup>1197</sup>

A rigid adherence to the time limits set out in the CFSA is justified on the basis that these limits respect the child's sense of time. As Freud, Solnit, and Goldstein had pointed out some four decades ago, a child's sense of time is different than an adult's. Setting a time limit on state intervention into the family is in the best interests of the child as it prevents the child from suffering uncertainty and insecurity for longer than is necessary. Furthermore, the time limits ensure that the child a child has a chance to attach to a "psychological parent" as quickly as possible in the case that the child has to be removed from the home.<sup>1198</sup> These are general rules and presumptions which have been instituted in recognition of an abstract concept of the child and the child's needs in order to ensure a universal right of the child in the child protection system to be free from undue intervention and to safeguard the right of the child to a safe and permanent placement as soon as possible.

However, as child welfare reformers advocated in the 1970s, a child-focused system of child protection requires not only that an understanding of child development and the

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<sup>1197</sup> While it is beyond the scope of this paper to review the causes of domestic violence, it is sufficient to note that domestic violence is not caused by a woman's pathological need to be beaten. There are dire social problems such as the feminization of poverty and oppressive gendered power relations which give rise to situations in which women are abused in their intimate relations with men. The provision of counseling services as opposed to financial services to help the mother alleviate her impoverished situation and get into a stable and safe environment helped to perpetuate the fallacy that it was the mother's own personal choice to engage in domestic violence. This helped to justify the removal of the child from her care, as it now appeared as if she was choosing to live in an abusive situation rather than to be a responsible mother for her child. On the intersection of poverty, social assistance reform and domestic violence see Mosher *et al*, *supra* note 52.

<sup>1198</sup> *Beyond the Best Interests of the Child*, *supra* note 914.

institution of rules in accordance with this child development knowledge, but such a system also requires a rigorous testing of intervention with the child. They advocated that the protection hearing should focus on the child and investigate the effects of the ground of intervention on the child. Otherwise, as Wald argued, the state may remove the child from an environment in which the child is functioning adequately, even if the parents lack the capacity to parent to agency standards. In order to ensure that a child was being removed as an absolute last resort, Wald and Mnookin recommended the provision of family services in the form of material supports as well as counselling services, in order to ensure that it was not the stresses of income, housing and food insecurity which were creating the risk to the child. They recommended the instituting of time lines *on top of* this supportive system of child protection to further secure the interests of the child.

A rigid adherence to the time lines in a system that has seen the scaling back of material supports to parents in poverty and a greater scrutiny on parental behavior as constituting risks to children, allows coercive state intervention in a family where parents are unable to remediate difficulties in the matter of 12 months to a year and a half (depending on the age of the child). The injustice that this presents to families marginalized by racism, sexism, ableism and class is staggering. Furthermore, by curtailing judicial scrutiny of state intervention into the family, the provision of time-limited “soft” services is legitimized as capable of adequately protecting children. In this way, parental behavior – often in functionally mother-headed families – is legitimized as the source of risk to children. The state is justified in failing to provide material supports and the courts are justified in seeing risks as personal failings as opposed to the product of disadvantage and inequality. A lack of maternal responsibility and not social and economic disadvantage are the real source of risk to children.

## Conclusion

Scholars of social policy have been noting for some time the scaling back of social services and the privatization of responsibility for individuals and family. The private sphere of the family and the marketplace are seen as the appropriate place for individuals to seek support. Welfare eligibility has been tightened and tied to employment, and initiatives such as the “spouse in the house” rule were instituted in order to disentitle women for whom it was assumed were receiving (or presumed *should* be receiving) support from a conjugal partner.<sup>1199</sup> In an era which has seen the neoliberal restructuring of welfare and the privatization of responsibility for reproductive labour, a rigorous testing of state intervention into the family in poverty is required in order to ensure that this intervention is warranted, beneficial to children, and is not perpetuating existing disadvantage. This is especially so given that the care-taking work of low-income mothers is no longer seen as deserving of public support. Low income mothers are expected to take responsibility for uncompensated work in the home and as well as undertaking compensated work outside of the home. If they are not able to navigate these responsibilities they are labelled as “dependent” and lacking in personal responsibility. In an era of neoliberal restructuring, not only are material supports clawed for marginalized families, but parents are constructed as presumptively undeserving of support.

In the early years of child protection law, the *Prevention and Punishment of Wrongs to Children Act* emerged amidst a climate not only concerned with protecting children, but of utilizing the sphere of the family to address the social and economic problems of the day. Relations in propertied families were shifted so that the absence of a male head of the family through desertion, or the absence of an economically productive male head through intemperance, could be compensated for by the mother. Women in

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<sup>1199</sup> See discussion in, Chunn and Gavigan, “Welfare Law, Welfare Fraud,” *supra* note 102.

families in poverty were expected to maintain the family without support from the public sphere. They were expected either to rely upon their own meager wages, or to apply for private charity, or to negotiate informal separation agreements without the protection of law. All the while, this activity in the private sphere was patrolled by criminal, vagrancy laws, and a quasi-criminal system of child protection. If a woman made money by prostitution, the criminal law would intervene. If a woman failed to keep her child off of the streets and in school, the quasi-criminal law of cruelty to children would intervene. If a woman applied for poor relief under the *Poor Law*, she would be sentenced to live in the Poor House.

While mothers' allowances helped to improve the material positions of some single mothers, and maternalist and child development constructions of the value of mother-work helped to improve their social positions, unwed mothers continued to be constructed as presumptively abnormal, neurotic, dependent and irresponsible. For these mothers, even the most coercive legal interventions – the permanent removal of the child from her care and custody – was justified. It was presumed that removal of the child from her care was in the best interests of that child.

Today feminist legal theorists point to the ways in which the lives of women in poverty, and particularly, racialized women in poverty, are governed by coercive public laws; by coercive immigration,<sup>1200</sup> criminal<sup>1201</sup> and welfare laws<sup>1202</sup> that simultaneously construct and regulate their activity as criminal in nature. Reports from the latest Nova

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<sup>1200</sup> Sedef Arat-Koc, "Neo-Liberalism, State Restructuring and Immigration: Changes in Canadian Policies in the 1990s" (1999) 24 J of Can Stud 31.

<sup>1201</sup> Dianne L Martin, "Both Pitied and Scorned: Child Prostitution in an Era of Privatization" in B Cossman and J Fudge, eds, *Privatization and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) at 355.

<sup>1202</sup> Janet Mosher, "Intimate Intrusions: Welfare Regulation and Women's Personal Lives" in S Gavigan and D Chunn, eds, *The Legal Tender of Gender: Law, Welfare and the Regulation of Women's Poverty* (Oxford: Hart Publishing, 2010) at 165.

Scotia's Minister's Advisory Committee on the *Children and Family Services Act* and *Adoption Information Act* (May 2008) indicate that child protection work is likewise experienced coercively by the families involved in the system. The 2008 report observed that:

Reports from social workers and professionals of support services echo the statement by J. Lafrance that "The overall paradigm in child protection agencies seems to be moving toward increasing power and control over clients and away from interpersonal elements necessary for the achievement of child welfare activities which are central to agency goals."<sup>1203</sup>

Critical feminist socio-legal scholars have observed that the moral regulation of the activity of families in poverty, particularly mothers on assistance, in a neoliberal era, has become more punitive and criminalized in character.<sup>1204</sup> As social assistance is scaled back, so the subjects who are constructed as the "undeserving" poor expands. While lone-mothers may have been constructed as deserving of support in the early years of Mothers Allowance, and eventually even some unwed mothers were seen to be deserving of support, today any mother that applies for public support is at risk for being labelled "dependent" and as Gordon and Fraser argue, "pathological".<sup>1205</sup>

In the era of cruelty to children, in which the first child protection act was introduced, the child of unwed mothers and of families in poverty was constructed as *filius nullius* – the child of no one. While the bastard child was as much a legal as a social construction, the child of families in poverty was constructed as *filius nullius* through the

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<sup>1203</sup> Minister's Advisory Committee 2008, *supra* note 53 at 47.

<sup>1204</sup> Chunn and Gavigan, "Welfare Law, Welfare Fraud", *supra* note 102 at 232:

This redefinition of the 'undeserving poor' has required a massive redeployment but, arguably, not a reduction in the allocation of state resources to welfare. The downsizing of social assistance payments is accompanied by a concomitant increase in state-subsidised make-work and workfare programmes that ostensibly will (re)turn participants to the labour force, and a dramatic increase in the state-implemented technologies and programmes which are aimed at ferreting out and punishing the 'undeserving' poor.

<sup>1205</sup> Gordon and Fraser, "A Genealogy of Dependency", *supra* note 81.

erosion of a legalized sphere of family autonomy which eventually culminated in the juvenile delinquents regime and the era of institutionalization. In taking absolute responsibility for the child in poverty the juvenile delinquent regime created a bastard child of the child in poverty. Just as *bastardus nullius est filius, aut filius populi*, that is the bastard child is nobody's son, or the son of the people; so the son of the people, is nobody's son.

The juvenile court did not need to test whether intrusion into the private sphere of the family was necessary, as there was no legalized private sphere of the family in poverty. There was no recognized legal presumption of family autonomy for these families, and liberty rights were conceptualized and provided for individually, by the *Liberty of the Subject Act*. But this lack of family autonomy for families in poverty was as much a social as a legal construction. Recapitulation theories, the science of "feble-mindedness" and the discourse of deservedness – provided an objective truthfulness by their use in law – served to render moot any need to consider the capacity of these families for providing for the best interests of their children. The fact of intervention into this incompetent family was presumed to be in the welfare of children.

Today, families in poverty are constructed as dependent, risky and undeserving of support. The science of risk is given legitimacy by use in law as a legitimate means of defining, calculating and addressing risks to children. When a family is labelled risky the beneficence of state intervention into these families is presumed and even the most coercive interventions are justified. As the family in poverty is constructed as unable to self-manage, lacking personal responsibility and ultimately dependent and pathological, the threshold for testing the need for and benefit of state intervention is lowered.

But this social and legal regulation of parents in poverty has not only served to disempower parents and subject them to repressive outside interventions. Since 2012, the Truth and Reconciliation Commission of Canada has generated awareness and issued Calls

to Action, regarding the abuses that were committed against First Nations children and the legacy of dislocation and disconnection that continues from this era.<sup>1206</sup> The construction of families from which these children came as dependent and, in the colonial discourse of the day, “uncivilized”, did not serve the interests of these children, either. The consequent “civilizing” techniques and discourses and the rendering of these children as productive, able, and independent citizens, did not serve their interests, but instead, served the interests of capital, of patriarchy, of colonialism and of racial segregation and subordination.

For white children the lessons of institutionalization were learned and responded to half a century ago. By the 1950s and 60s, child development experts, social assistance professionals, as well as child welfare professionals all recognized the dangers of institutionalization and consequently espoused the value of mother-work. Child development experts espoused the value of proper maternal attachment, social assistance professionals espoused the importance of Mothers Allowance, child welfare professionals espoused the value of preventative social work and legal professionals espoused the value of parental rights. The lessons of institutionalization had taught that there had to be a healthy skepticism of state care. A legal concept of family autonomy for marginalized families provided the necessary critique of the presumed beneficence of state care and served to erect a threshold test of the need for state intervention into even unwed-mother-headed families. But, as I argued in Chapter 4, the concept of natural parental rights and in particular, the concept of the child in need of protective services still contained vague notions of fitness which served to subject certain marginalized families to damaging value judgments.

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<sup>1206</sup> Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2012), online: Truth and Reconciliation Commission of Canada <[http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls\\_to\\_Action\\_English2.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf)>.

In the 1970s both child development and child welfare law reformers argued for the introduction of a “least detrimental alternative” model of child welfare. Both argued for the adoption of substantive notions of family autonomy in child protection law in the interests of the child. In particular, they argued for greater focus on the child and objective harms or substantial risk of harm to the child and the elimination of damaging value judgments which served to justify state intervention into marginalized families based not upon a child-centered ethic, but racist, gendered, ableist and classed values. They argued for the provision of material services such as housing and income maintenance in order to ensure that the family’s position of poverty was not itself the cause of harm to the child. A child protection system predicated on the health and well-being of children, they argued, required support for family autonomy to prevent undue intrusions into the marginalized family which would itself be traumatic for children. A child-centered concept of child protection would actually scrutinize the beneficence of state care and weigh this against the care of the family where the child may be functioning adequately. The interests of the child, they argued, relied upon challenging decisions which were based not upon their own particular, contextualized best interests, but upon decisions that served political interests.

Rather than a child-centered system of child protection and a substantive and contextualized notion of family autonomy, however, a neoliberal restructuring of welfare and the child protection system has seen a redrawing of the private sphere of the family in poverty. Rather than material supports and a valuing of care work within families in poverty, neoliberal restructuring has seen the devaluing of care work and a greater insistence on self-sufficiency and independence for families in poverty. Furthermore, as feminist theorists have shown, social policy has emphasized “less eligibility” for previously “deserving” groups,<sup>1207</sup> as well as more punitive measures for the undeserving. Child

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<sup>1207</sup> Joan Gilmour, “Retrenchment not Reform: Using Law and Policy to Restrict the Entitlement of Women with Disabilities to Social Assistance” in S Gavigan and D Chunn, *The Legal Tender of Gender*, *supra* note 41 at 189.



welfare work itself supports these categories of deservedness with the discourse of risk and targets high risk families with surveillance, a denial of basic rights to privacy, and potentially, the removal of the child from their care.

Rather than challenging these negative constructions of families and rigorously testing the need for coercive interventions, contemporary child protection jurisprudence overall has served to legitimize the construction of socio-economically marginalized families as risky and has justified a coercive intervention. Child protection jurisprudence tends to reinforce the connection between family autonomy and liberal values of self-sufficiency and independence by failing to challenge the legitimacy of risk assessment tools and by failing to demand that in the process of proving risk to the child, greater focus is placed on the child him or herself. Furthermore, the jurisprudence actively constructs marginalized families as risks to their children by adjudicating matters of personal, social and economic disadvantage as risks to children caused by parental conduct and lack of responsibility. Rather than testing the need for state intervention, state intervention is justified as presumptively necessary when socio-economically marginalized families are involved. Furthermore, as these risks to children are the result of parental conduct, services which are aimed at changing parental conduct such as supervision, parent education and capacity assessments are justified as capable of remediating risks to children. In turn these services extend surveillance over the family and serve to focus evidence on parental conduct and away from the child and the child's needs. In the end, child protection jurisprudence fails to scrutinize the need for and character of state intervention into the family. In so doing, a residual system of support is justified as risky parental conduct is the sole source of risk to children, justifying "soft" services on a time limited basis.

It is also important to note that while psychiatric evidence is compiled to predict risk, this evidence rarely predicts the risk of state removal of the child. Rather, psychiatric

diagnosis – provided as a “service” to the parent to help remediate problems in the family and support family autonomy and integrity – focuses risk squarely on the parent and on the parent’s ability and willingness to take responsibility for their “deficits”. A focus on psychiatric evidence and parental deficit also affects the dispositional stage of the child protection hearing. By the time numerous reports are compiled – the parent by this time having received parental assessment services, psychological services, addictions counselling services, parenting classes, budgeting classes, anger management counselling, etc. – the dispositional hearing becomes almost wholly focused on parental shortcomings and their willingness to overcome these. Again, attention is focused away from the child – evaluating harm to the child, the child’s needs and best interests – and away from the risk posed by state intervention with, and guardianship of, the child.

This “responsibilizing” for what should be considered social problems addressed as our shared responsibility if we truly want to promote the best interests of children from marginalized families, helps to justify a residual model of child protection. As a result it also justifies a coercive engagement with marginalized families, most often, lone-mother-headed families suffering from complicated and intersecting issues of mental health, poverty, racism and domestic violence. Furthermore, failing to challenge this responsibilizing and asserting that family autonomy and the best interests of children requires greater scrutiny of the beneficence of state care of children and their substantive social and economic support by the state, serves to further perpetuate experiences of inequality at the intersection of mental health, poverty, racism and gendered subordination.

## **Chapter 6: Conclusion:**

### **Rethinking Autonomy for Marginalized Children and Families**

At the end of the 19<sup>th</sup> century in Nova Scotia, the nuclear family and the relationships among its members became a focus of law and policy. This was particularly so in Halifax where industrialization, urbanization and economic recession exacerbated social and economic inequalities in the city. The result of this inequality was not only a proliferation of crime, poverty and violence, but a culture of social reform. Religious values of temperance and moral righteousness, along with liberal values of formal equality and the rule of law, converged on the problems of intemperance, desertion by men of their families, cruelty to children and women's legal personhood in particular. Women were an important part of the reform process, becoming not just objects of reform, but also central players directing the reforms that took place.

The family, the natural, affective sphere over which women had such intimate and unique knowledge, became the focus of much social and legal reform effort. The legal regulation of the relationships within the family became one way to carry out social reform. This is not to say that social reform was carried out exclusively by repressive means; as Nikolas Rose and others have pointed out, “[d]omestic, conjugal and parental conduct is increasingly regulated not by obedience compelled by threat of sanction but through the activation of individual guilt, personal anxiety and private disappointment.”<sup>1208</sup> The moral regulation that accompanied the legal regulation of the family encouraged both the subjects and objects of reform to identify as teetotalers, suffragists, and Christians in distinction to paupers, drunkards, and sinners. But legal reform was necessary to change society quickly and with certainty, to create and enforce married women's property rights

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<sup>1208</sup> Rose, “Beyond the Public/Private Divide”, *supra* note 100 at 73.

and custody of their children, and to ensure the safety and proper guidance of unfortunate children. A re-ordering of the relationships within the family was capable of changing the social positions of individuals to meet the new social and economic challenges of industrialization, urbanization and economic recession, without a large state apparatus.

Effecting social change through the legal regulation of the family, however, also meant that where moral and social regulation was not effective, the recalcitrant subject could be made to obey by force of law. Where deserting and intemperate husbands failed to provide for their wives and children, the married woman's rights to property could be enforced and her rights to custody and maintenance could be ordered by the Supreme Court. While the family regulated by the common law was accorded a sphere of privacy and autonomy by virtue of the presence of a male head, private family law reforms at the end of the 19<sup>th</sup> century in Nova Scotia provided that the father's failure to provide financially for the family would see the abrogation of his absolute patriarchal rights under the common law.<sup>1209</sup> For families which could remain self-sufficient through the mother's wages, business dealings, personal or real property, support from extended family, or even through the ordering of alimony and maintenance from the father, family autonomy was maintained by shifting responsibility for the family to the mother. For the recalcitrant subject in poverty, however, it was not private family laws but reform of public family laws that ordered family relations at the end of the 19<sup>th</sup> century.

Criminal laws, vagrancy laws and poor laws were the laws to which the poor in the late 19<sup>th</sup> century were subject. Even with family law reforms at the end of the century that saw an emphasis on the delineating the private sphere of the family, the force of public and not private laws was brought to bear on the recalcitrant subject in poverty. Furthermore, the success of family law reform at the end of the 19<sup>th</sup> century was not as visible for women

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<sup>1209</sup> It is noteworthy, that while this was instituted in legislation, as Backhouse points out, judges were very resistant to this change. See Backhouse, "Pure Patriarchy", *supra* note 183.

in poverty as it was for propertied women. While propertied women – still subjugated in both the public and private spheres – were becoming increasingly autonomous legal subjects, women in poverty were advocating for themselves and their children without access to superior courts, lawyers and legal protections. The intemperate or deserting father in poverty was confronted not by lawyers, and superior Court judges, but by philanthropists and stipendiary magistrates. However, calling on philanthropists such as the Society for the Prevention of Cruelty to improve their positions and the positions of their children posed its own threat. While women in poverty were successful in shaping the activity of the Society (as Linda Gordon has pointed out, there was no Society for the Prevention of Cruelty to Women, but women attempted to create one),<sup>1210</sup> they risked a stigmatizing and potentially dangerous intervention which could see them labelled “idle and dissolute” and their children removed from the home.

The increasing visibility of the child as a legal subject in the late 19<sup>th</sup>- early 20<sup>th</sup> century also came with its own promises and dangers for children in poverty. While the family, as regulated by the common law, saw the child treated as the property of his father, law reform at the end of the 19<sup>th</sup> century saw private custody decisions increasingly focused on the welfare of the child and parents of the child positioned more in terms of trustees for their children than owners. Children in poverty were increasingly positioned as deserving of support and public assistance. They were removed from the general population of the Poor House and modern institutions were built for their care. Public provision was made for their schooling and laws put in place that mandated their presence in schools. Hours and conditions of work legislation was passed as was legislation safeguarding their moral upbringing. Children were to be kept off the streets, out of saloons, places of entertainment, and factories and they were to be prevented from consuming tobacco and

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<sup>1210</sup> Gordon, “Family Violence, Feminism, and Social Control”, *supra* note 43 at 472.

opium. In this way, children became a concern not just of their parents, but of society as a whole.

Again, while children of propertied families were dealt with using private family law legislation such as the *Custody of Infants Act* and the *Court of Divorce Act*, the behaviour and care of children of the poor was regulated by public laws; the first child protection act in Canada, the *Prevention and Punishment of Wrongs to Children Act*, is but one example.<sup>1211</sup> The consequence was that the care of the children of the poor was more of a social responsibility than the care of children from propertied families. However, public concern for children in Halifax by the early 20<sup>th</sup> century was ambiguous: the child was variously neglected and blameless or delinquent and devious. The juvenile delinquent system regularly conflated these two categories. Nonetheless these were the children of marginalized families and they had become a public responsibility. Their care and upbringing were of public concern as they represented not only a current threat to the social order, but they represented the future of the province. The juvenile delinquent and child protection regime, along with the denominational institutions, took responsibility not only for their care but for their proper socialization.

While public concern for the unfortunate improved the situation of many children, for many this era represented an era of violence and dislocation. Children were removed from their families to be molded by the institutions into productive, normal citizens. The practices and techniques that disciplined these children were premised on the white, productive, able-bodied, sexually appropriate child as norm. Mainstream Canadian society

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<sup>1211</sup> *Prevention and Punishment of Wrongs to Children*, SNS 1882, c 95, *Prevention of the Use of Tobacco and Opium by Minors*, SNS 1892, c 50, *Maintenance and Reform of Juvenile Offenders*, SNS 1890, c 23, *Of the Transfer of Immigrant and Orphan Children*, RSNS 1900, c 118, *Of the Licensing of Boarding Houses for Infants Under Twelve Years of Age*, SNS 1897, c 40, *Of the Closing of Shops and the Hours of Labour Therein for Children and Young Persons*, SNS 1895, c 17.

is only beginning to hear the voices of, and learn from the survivors of these institutions about the extent of the suffering experienced by children who did not fit this normative ideal. On June 2, 2015, the Truth and Reconciliation Commission of Canada released their Calls to Action on the system of Indian Residential Schools in Canada, of which the Shubenacadie Indian Residential School in Nova Scotia was a part.<sup>1212</sup> The Interim Commission Report details the extent of the abuse and suffering experienced by some of the children for which white Canadian society took responsibility to “civilize” and the lasting effect this has had on First Nations in this country.<sup>1213</sup> In Nova Scotia we are only beginning to learn of the violence perpetrated against African Nova Scotian children and the African Nova Scotian community in general as a result of the abuses perpetrated at the Nova Scotia Home for Colored Children in Preston, Nova Scotia.<sup>1214</sup>

The era of institutionalization should have taught us that there needs to be a healthy skepticism about the beneficence of unchecked state intervention and guardianship of children. Lessons that we are only now coming to terms with in Canadian society are an important warning of the violence that can be perpetrated when we do not subject vague notions of harm to, and the best interests of, children to scrutiny. Both denominational and psychiatric personnel were given a great deal of authority in the institutional era of child welfare in producing the industrious, morally upright citizen from children of marginalized populations in Nova Scotia. In the jurisprudence, denominational and psychiatric knowledge of harm and best interests reigned over liberal assertions of

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<sup>1212</sup> *Calls to Action*, *supra* note 1206.

<sup>1213</sup> Truth and Reconciliation Commission of Canada, *They Came for the Children: Canada, Aboriginal Peoples and Residential Schools* (Winnipeg: Truth and Reconciliation Commission, 2012).

<sup>1214</sup> June 2015 the Government of Nova Scotia announced a Restorative Inquiry into the Nova Scotia Home for Colored Children, online: Restorative Inquiry <<http://restorativeinquiry.ca/restorative-inquiry>>.

rights in the juvenile court. Little to no attention was paid to the legal presumption of family autonomy of these marginalized families. This era shows us the importance of a presumption of family autonomy for children, especially children that find themselves marginalized at the intersection of class, gender, racism and ableism. Starting from a presumption of family autonomy at law serves as an important critique to the vague best interests standards developed by human service professionals, which are not free from the demands of social relations and maintaining social order. Diagnoses and treatment of children on the basis of “feeble-mindedness” and “recapitulation theory” served to reinforce overarching relations of power which constructed not just the parents, but the children of marginalized families as dependent and pathological and in need of even the most coercive of state interventions.

The legal concept of natural parental rights that developed in the 1950s with the critique and demise of institutionalization was important for testing the necessity and beneficence of state interventions with children from some marginalized families. While *Adoption Acts* had for decades provided unwed mothers in Nova Scotia with the basic right to determine the adoption of their illegitimate children, it was not until courts challenged the construction of unwed mothers as delinquent, neurotic and presumptively “unfit” that this formal presumption of family autonomy for unwed-mother-headed families could be realized at law. This concept of natural parental rights and the development and enforcement of a legal concept of the autonomy of the family was necessary – although not sufficient – to facilitate the ability of marginalized families to self-determine. While the propertied, white, patriarchal, nuclear family was supported in its autonomy by the social, economic, legal and political systems of the time, a notion of family autonomy in the form of natural parental rights was essential to allow some marginalized families, especially unwed-mother-headed families, to stay together and direct the care of their children. The notion of natural parental rights allowed appellate courts to challenge the authority of



denominational personnel, psychiatrists, social workers and trial judges to determine and act upon an uncritical and abstracted concept of the best interests of the child.

But the promise of the jurisprudence of “natural parental rights” for marginalized families was again, uneven. While the unwed mother-headed family was finally accorded at law the status of a legitimate family form, and thereby entitled to a legal sphere of autonomy, this protection came with strings attached. Court protection of family autonomy for mother-headed families was contingent not upon their status solely as being “unwed”, or even in being wholly economically self-sufficient, but upon their conforming to notions of “fitness” and propriety. Concepts such as the neglected child<sup>1215</sup> and the child in need of protection<sup>1216</sup> were less concerned with one’s status, ie., as a pauper, delinquent, unwed mother or intemperate father, but in the process parental behaviour came under intense scrutiny. While the reforms in 1976 required the CAS to show a need for state intervention before a determination of the best interests of the child could be made, this need for state intervention was often predicated upon moralizing and normalizing grounds of “fitness”. The parents that were found to be “unfit” were more likely not to match the mold of the normal, white, middle-class, nuclear family.

While unwed mothers were declared by the Supreme Court of Canada to be accorded a sphere of autonomy, in the post-war years these families came under particular scrutiny by child welfare authorities and judges enforcing child welfare legislation. By the 1970s, child welfare reformers such as Michael Wald and Robert Mnookin were arguing for more determinate notions of harm and best interests which turned attention away from vague assessments of parental behaviour and instead, focused on the child and the child’s needs. Recognizing that the families involved with the child protection system were families marginalized by racism, sexism, ableism, and class, they argued that justice for

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<sup>1215</sup> *Child Welfare Act*, SNS 1950, c 2.

<sup>1216</sup> *Children’s Services Act*, SNS 1976, c 8.

these families required a rigorous testing of the need for coercive intervention into the family and a challenging of the negative value judgments made by white, middle-class judges and social workers. This testing of the need for intervention required the state not only to show objective immediate or imminent risk of harm to the child but proof that there were no other reasonable means with which to protect the child, including by way of the provision of material supports to the family.

In the last chapter I argued that changes to public assistance and social work practice undermined the reforms advocated by Wald and Mnookin that were introduced in the *Children and Family Services Act*. In particular, I argued that changes to social assistance and changes to social work practice have had an appreciable effect on work with families in the child protection system. When social assistance and social services are scaled back, the child protection system is called in to remediate problems of poverty on a crisis basis. As such, child protection scholars claim that we have seen a move back to a residual system of child protection services, including formalistic notions of family autonomy for families in poverty.<sup>1217</sup> This has not resulted in a de-regulation of families in poverty, but rather, a re-regulation from a discourse of moral worthiness to a discourse of risk and personal responsibility. Just as unwed mothers were constructed as dependent and pathological, thereby justifying even the most coercive interventions in the child welfare system, so “high risk” mothers today are targeted by child protection law and practice and coercive, rather than supportive interventions are justified on this basis.

Similar to the impact of the discourse of maternal “fitness” in previous years, focusing on maternal deficit as the cause of social and economic disadvantage serves to justify the privatization of social reproduction as it is maternal behaviour and not social

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<sup>1217</sup> See for example, Lessard, “Empire of the Lone Mother”, *supra* note 116.

and economic inequality which leads to disadvantage. Instead of proof of objective harm or substantial risk of harm to the child, and a close examination of how state interventions will address this harm, a great deal of decision-making power has been given over to the predictions of risk assessment tools, parental capacity assessors and human service professionals to determine the need for intervention into the family. Furthermore, in failing to question not only the limits of determinations of risk, but the nature of state intervention with the family – including the provision of family preservation services and care of the child – child protection jurisprudence reinforces rather than challenges a return to a residual system of child protection services.

In this thesis I have tried to show that the history of child protection and the history of welfare have been intertwined and we cannot understand one without the other. Constructions of “bad mothers” and “intemperate fathers” are often interdependent on the construction of the “undeserving” poor in welfare discourse. These constructions have an important effect on where the public/private divide is drawn. While “good mothers” and their children are provided public support, “bad mothers” are held responsible and are left to fend for themselves. Their children, in the meantime, are left to navigate this shifting, insecure boundary between state care and the search for a permanent private space.

This is also not to say that mothers and children have been total victims of this social and legal regulation. However, the history of women’s activism to challenge the more repressive aspects of child protection law and practice is a history of both successes and defeats. The provision of Mothers’ Allowances, for example, was a double-edged sword for women in poverty. While women’s activism and criticism of the institutionalization of children resulted in the provision of mother’s allowances so children could remain in mother-headed families, the provision of mother’s allowances ended up reinforcing a particular moral regulation of mothers in poverty. Furthermore, this moral regulation

served to exclude unwed mothers from mothers allowance eligibility altogether and to depict unwed mothers as presumptively unworthy of support.

Despite this moral regulation, however, unwed mothers continued to advocate for themselves and their children, challenging the CAS preference for adopting out their children. In the 1950s, the Supreme Court of Canada began responding to the demands of unwed mothers for a contextual right of family autonomy. However, while they were successful in advocating for recognition of their natural parental rights, there was a cost for unwed mothers in poverty. As we saw at the end of Chapter 4, while natural parental rights were an important recognition of the legitimacy of mother-headed families, they also served to reproduce a moral regulation of unwed mothers in poverty. More young, unwed mothers were able to maintain custody of their children, and eventually, in 1966 they became eligible for social assistance in Nova Scotia. However, at the same time unwed mothers marginalized by classism, racism and ableism coming under close scrutiny of child protection authorities and were subject to vague and stigmatizing determinations of fitness.

For children, as well, this history has been one of success and limitation. Children's positions no doubt have improved from the days when they were kept in poor houses, incarcerated with adult criminal populations, left in reformatories and born at unregulated maternity homes that disposed of "invaluable" children. In 1991 the province introduced the most child-centered child protection act the province had ever seen.<sup>1218</sup> And yet, my argument in this thesis has been that no matter how "child-centered" a child protection regime, if the concept of family autonomy on which that regime is based, does not challenge the construction of marginalized families as unworthy, unfit and "risky," then

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<sup>1218</sup> *Children and Family Services Act*, SNS 1990, c 5.

we are operating on an abstract notion of the best interests of the child which is in danger of reproducing and deepening socio-economic marginalization.

### **A Supportive Legal Concept of Family Autonomy**

The very way that dependency is conceptualized in a residual system of welfare provision reinforces the notion that families in poverty are pathological and presumptively risky. The private sphere of the family in poverty is far from the liberal ideal of family privacy, marked by independence, liberty, and self-sufficiency. In this thesis I have shown that through history the family in poverty has been the subject of repressive social and legal regulation in ways that the middle and upper-class, white, nuclear family has not been. The unwed mother and her illegitimate child, for example, have been the subject of repressive interventions on behalf of law and society in this province since the very beginning.<sup>1219</sup> While many women have challenged their subordinate positions through history, using the law and other resources available to them to empower themselves and

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<sup>1219</sup> For example, SNS 1758, title 7 *Bastard Act*:

1. A woman, delivered of a bastard child, likely to be chargeable to the Province, who shall, at the time of delivery, declare to the person assisting, who the father was, and shall, some time before declare herself with child of a bastard, in either case the nearest Justice to take examinations in writing and, at the desire of the Overseers of the Poor, or householder of the place, to commit the father to prison, unless he give security to indemnify the place, and to appear at Sessions, where he is to be continued on recognizance until woman delivered. If woman die, or be married before delivery, or miscarry, or shall not be with child, person charged to be released.

2. Where child born, the two nearest Justices at the desire of the Overseers or of a substantial householder, upon due examination, are to make an order for the relief of the place, and that the mother or father do find security to indemnify the place or pay 20 l. to be given to the Overseers. If, after order made, mother or father, on notice, shall not perform the same, they are to be committed, unless they give security to appear and perform the order of the next Sessions, or otherwise, the first order. Appeal by party thinking themselves injured, to be to Sessions, where the cause is to be tried by Jury.

3. **A woman who falsely accuse another to be committed to the house of corrections for six months there to be whipped.** [emphasis added].

their children, the private sphere of their families is not a space free from interventions, characterized by unencumbered self-sufficiency. The failure to remain free of these interventions has come with devastating results. The liberal discourse of autonomy has exhorted subjects to be free and independent from state support, and those that cannot be free are constructed as dependent and pathological. As we have seen in the history of child protection law, this construction can come with devastating effects as law steps in coercively to discipline the child and the family, submit the child and the family to surveillance, and remove the child from the family, in order to try to mold the child into the self-sufficient liberal individual.

In attempting to craft a concept of autonomy that does not reproduce the same relations of raced, gendered, and classed power, feminists have attempted to find an empowering notion of autonomy which is supportive of mothers and children in poverty. As Martha Albertson Fineman has argued, “Perhaps the most important task for those concerned with the welfare of poor mothers and their children, as well as other vulnerable members of society, is the articulation of a theory of collective responsibility for dependency.”<sup>1220</sup> Fineman therefore challenges the residual nature of support which our central liberal concepts of independence, autonomy and self-sufficiency justify:

Our state, through its capitalist nature, is perceived as having a role in the delivery of social goods only in the case of family default. In such instances, the state might provide highly stigmatized assistance (welfare) for those (deviant) families unable to provide for their members’ needs.<sup>1221</sup>

By contrast, she argues that we need to subsidize caretaking work and thereby shift responsibility for women and children in poverty to the collective. Fineman’s notion of family autonomy entails a “right to autonomy or self-determination for the family, even as

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<sup>1220</sup> Fineman, “Cracking the Foundational Myths”, *supra* note 121 at 16.

<sup>1221</sup> Fineman, *The Autonomy Myth*, *supra* note 125 at 292.

it is firmly located within a supportive and reciprocal state.”<sup>1222</sup> She articulates a critical feminist notion of autonomy that socializes responsibility for caretaking work on the basis that dependency is not an aberrant state but, “unavoidable and inevitable; it is developmental and biological in nature.”<sup>1223</sup> These caretakers that take on this uncompensated work are in the main, women.

Recognizing that dependency, or vulnerability, is not a choice but an inevitable state that we as a members of a society all have, and will all be in, grounds Fineman’s claim for seeing caretaking as a social debt or collective responsibility.<sup>1224</sup> She argues for a reconceived sphere of privacy around the caretaker-dependent relationship and in particular, the mother-child relationship, which demands collective responsibility for this relationship. At the same time, the caretaker-dependent relationship is provided by the capacity (in the form of material supports from the state and supportive state policies) to self-determine as well as the right to demand a certain sphere of non-intervention. Autonomy is “gained when an individual has the basic resources that enable her or him to act consistent with the tasks and expectations imposed by society.”<sup>1225</sup> Mothers that seek support in order to live up to the obligations placed upon them by the state and society are viewed as entitled to this support as of right, rather than as dependant and pathological.<sup>1226</sup>

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<sup>1222</sup> *Ibid* at 294.

<sup>1223</sup> Fineman, “The New Deal: From De-Regulation to Re-Regulation”, *supra* note 123 at 263.

<sup>1224</sup> In Fineman’s more recent work she uses the concept of vulnerability rather than dependency to ground the claim to collective responsibility for caretaking work. Her use of the concept of human vulnerability rather than dependency, she argues, captures the notion that “vulnerability arises from our embodiment, which carries with it the imminent or ever-present possibility of harm, injury and misfortune.” *Ibid* at 267.

<sup>1225</sup> Fineman, “Cracking the Foundational Myths”, *supra* note 121 at 25-26.

<sup>1226</sup> See Fraser and Gordon, “A Genealogy of Dependency”, *supra* note 81 at 309.

Reconceptualizing autonomy in terms of support for the caretaker-dependent dyad holds critical potential for effecting justice for mothers and children in the child protection system. First, greater material support for these mother-headed families would keep many from reaching the crisis points that lead them to be confronted with the child protection system to begin with.<sup>1227</sup> And second, as Fineman points out, shifting to an ethic of collective responsibility would serve to undermine the negative constructions of mothers and children in poverty.

But as children's advocates have pointed out, even within a system which takes collective responsibility for the caretaker-dependent unit, we require standards of intervention which will protect children from harm where it does occur.<sup>1228</sup> Collective responsibility for caretaking would serve to undermine the material deprivation and social regulation of mothers and families in poverty that sees them overrepresented in the child protection system, but this would not in itself eliminate physical, sexual and psychological violence against children. Child-focused standards of intervention to address violence to children would still be needed, as would child-focused standards of child placement.

A concept of family autonomy which is premised on a notion of collective responsibility and subsidy for caretaking, however, would have a profound effect on the way that child protection services would not only define physical, sexual and psychological violence against the child, but it would change how those acts of violence are addressed and proven at law. Rather than the provision of soft services which turn attention back on parental conduct and on parental fault, collective responsibility for caretaking would

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<sup>1227</sup> See Maxine Eichner, "Children, Parents, and the State: Rethinking Relationships in the Child Welfare System" (2004-2005) 12 Va J Soc Pol'y & L 448. Beyond higher welfare rates, Maxine Eichner also recommends the introduction of state supported day care, hours of work legislation, the end of workfare type programs for welfare eligibility, free early childhood education programs for children from low income families as well as, after school program for those children, substantive substance abuse programs for their parents and greater rights to health care in general.

<sup>1228</sup> For example, see Woodhouse, *supra* note 131.



mandate that where services are provided, hard services take priority to ensure the family is not suffering from housing, income or food insecurity. This would shift the focus of both finding and disposition stage hearings away from an emphasis on parenting capacity assessments and psychological testing of the parents and more towards ensuring that the agency has proven objective acts of violence against the child, or that there is substantial risk of these acts being committed against the child. The findings stage would remain focused on the violence perpetrated against the child or the substantial risk of violence against the child, backed by objective proof of how this substantial risk is affecting the child, ie., severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour, etc.

Recognizing an entitlement to subsidy for caretaking work would also assist to focus attention on what collective responsibility for the child will look like outside of the family. Placing a high societal value on collective responsibility for dependency and vulnerability would require the agency to show in detail what effects the child has suffered as a result of the violence or substantial risk of violence, and exactly how state care of the child is going to address these harms. The state would have to set out what services would be provided to the child, what are the actual chances of adoption of the child, and the likelihood the child will remain in foster care for years. And above all, a respect for the caretaker-dependent unit would require a rigorous testing of state evidence as to how care is a more desirable option for the child than parental care, once substantive services have been provided to the family. Determinations of the best interests of the child which are merely negative – ie., that it is in the best interest of the child to be removed from the deficient parent – would give way to a more contextualized best interests determinations which actually demands an articulation by the agency of the content of both the child and

caretaker's right to state support and a detailed plan of what this support will look like.<sup>1229</sup> State support for family autonomy conceived of positively as an entitlement for the caretaking unit, and not in residual terms (ie., the delivery of social goods only in the case of family default) would seek to accommodate arrangements in the best interests of the child that go beyond simply placing the family under a supervision order or removing the child from the offending family.

A critical feminist concept of family autonomy which is based on an ethic of responsibility for the caretaker-dependent unit, has the potential to effect justice for socio-economically marginalized families, even in a society that does not itself take collective responsibility for that unit. First, current depictions of family autonomy in the child protection system depict family autonomy conceived of in terms of “parental rights” versus “children’s rights”. The way in which family privacy has been conceptualized in the case law presents a dichotomous picture of a greater degree of privacy resulting in the greater degree of harm that can be inflicted on children.<sup>1230</sup> However, both a lack of material support for, and negative constructions of, families justify coercive interventions that are in themselves harmful to children, and turn attention away from a rigorous testing of what state care of children will actually look like. As Wald and Mnookin argued, a dichotomous view of family and children’s rights serve to undermine a child-focused system of child protection.

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<sup>1229</sup> We see a trend emerging in Nova Scotia for example, in the cases of *Nova Scotia (Minister of Community Services) v TH*, 2010 NSCA 63 and *Children and Family Services of Colchester County v KT*, 2010 NSCA 72, in which the Court of Appeal has been curtailing the discretion of trial judges to make orders for access after an order for permanent care and custody in favour of the Agency. The Court of Appeal has held that once an order for permanent care and custody is made, the judge no longer has jurisdiction to make orders affecting Agency decision-making. The Court seems to be urging less judicial discretion over Agency decision-making even where orders for access are made in the best interests of the child. This curtails the court’s ability to challenge the authority of the state to determine what happens with children and to ensure that the state is working in the best interests of children.

<sup>1230</sup> See *Winnipeg Child and Family Services v K LW*, [2000] 2 SCR 519, SCJ No 48.

Instead, a critical concept of family autonomy which is capable of effecting justice for children from socio-economically marginalized families must see that the best interests of children from these families are provided for by both material and normative support for family autonomy. Without support for family autonomy for socio-economically marginalized families, abstract evaluations of what comprise the best interests of children – based upon an idealized standard of normalcy – will reign over a rigorous evaluation of the need for and nature of state intervention with the child. Presuming the beneficence of coercive state intervention based upon a family’s status of socio-economic marginalization provides us with a formalistic and inadequate concept of the best interests of the child. We fail to take into account the warnings of child protection experts from almost half a century ago; that even the most seemingly benign of coercive interventions with the family – such as placing the family under a supervision order – can have negative psychological effects for the child. Furthermore, the history of child protection law has taught us that failing to rigorously scrutinize the need for and nature of state care of children and the abstract notions of normalcy upon which this care is based, can have devastating effects for children who are marginalized by racism, sexism, class and ableism.

A critical legal concept of family autonomy must start from the premise that the way that harms have been defined, investigated and addressed by child protection law, whether with the concept of the “delinquent or neglected child”, the “fitness” of parents, and now, risk-focused grounds of harm, have always had a disproportional impact on the lives of families in poverty. Since the introduction of child protection legislation in Nova Scotia over a century ago, the families that have found themselves most often subject to interventions are families that are marginalized by class, racism, sexism and ableism. A contextualized notion of family autonomy in child protection law requires a recognition and acceptance of this fact. Concepts of harm and best interests which fail to keep this in perspective are in danger of reproducing a formalistic concept of family autonomy which

does not serve the interests of children or their families but rather reproduces inequality and disadvantage.

Support for such a presumption of family autonomy in child protection law would focus on removing the most disempowering uses of risk from the system and on demanding a recognition of the state obligation to protect and support the child within the family. At law, risk is most harmful when it justifies extending surveillance and control over families while at the same time justifying less support for the family. As this thesis has shown, not only is risk used to negatively construct socio-economically marginalized mothers as “bad mothers” but risk is also used to responsabilize these mothers and justify the scaling back of material supports for these families. In this thesis I have shown that the more risk-focused the ground of harm, including the grounds of emotional harm, neglect, and exposure to domestic violence, the more likely we will see a reliance on psychiatric and professional evidence to assess a parent’s level of risk. It is with these grounds of harm in particular that rely so heavily on extrapolating from parental characteristics or behaviours to possible harm to the child, that we have to scrutinize for negative constructions of parents and children, and for the justifying of residual support. Furthermore, the best interests of children from socio-economically marginalized families demand that we render visible the social and economic dynamics of harm which the categories and technologies of risk obscure. Formalistic notions of intervention and protection which do not address these structural risks must be seen for what they are: a failed attempt to provide for the needs of children from socio-economically marginalized families.

As such, child protection law should mandate that the agency prove it has taken a “differential response” based upon the grounds of harm it pleads to justify finding the child in need of protection. Where the agency is alleging risk-based grounds, as well as the grounds of neglect, emotional harm, or exposure to domestic violence, the agency should not be able to make out these grounds until it has shown that it has offered “hard services”

to a family based upon an environmental assessment of the family's needs. These hard services include material supports such as to address health, income, housing and food insecurity including income and housing maintenance services. As the CIS 2008 has shown, both housing and income insecurity are correlated to substantiated cases of maltreatment.<sup>1231</sup> Where the agency is not able to provide these services to address family need it should not be able to legally coerce the family to accept services or face the removal of the child.

As researchers in the field of child protection reveal, "Risk of maltreatment, neglect and domestic violence cases seem to predominate those being referred to [child protection services]."<sup>1232</sup> As a result of concerns over increased caseloads and the sustainability of child protective services as well as a shift from "a pathological to a more relational/ecological model" of child protective services in some jurisdictions in Canada,

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<sup>1231</sup> The 2008 CIS found that 33% of households in which a case of substantiated child maltreatment was found received social assistance, employment insurance or other benefits. In 20% of all cases of substantiated maltreatment, the family had experienced one move in the last twelve months, and in 10% of cases the family had experienced two moves in the past year. In 12% of households the presence of at least one household hazard (ie., drugs or drug paraphernalia, unhealthy or unsafe living conditions, or accessible weapons) was found. Furthermore, 11% of households with a substantiated maltreatment were households in public housing units. *Canadian Incidence Study of Reported Child Abuse and Neglect – 2008*, *supra* note 910 at 42-43.

<sup>1232</sup> Alicia Kyte, Nico Trocmé, Claire Chamberland, "Evaluating Where We're at with Differential Response" (2013) 37 *Child Abuse & Neglect* 125 at 125. Furthermore, in a separate article, some of the authors provide further evidence of the difference between the prevalence of investigations that met the "urgent protective investigation" criteria [severe injury or health condition; a possible victim of sexual abuse; under four years old and high risk of serious injury as a result of abuse or neglect] and other, non-acute investigations based on national CIS results. See Nico Trocmé et al, "Urgent Protection versus Chronic Need: Clarifying the Dual Role of Child Welfare Services Across Canada" (2014) 3 *Soc Sci* 483 at 491:

From 1998 to 2008 the number of investigations that met one of these three criteria for urgent protective investigation has remained virtually unchanged, at a little over six investigations per 1000 children. In contrast, other maltreatment related investigations have more than doubled, going from a rate of 15.39 investigations per 1000 children in 1998 to 33.13 investigations per 1000 children in 2008, an increase that has been driven by investigations of children exposed to intimate partner violence and risk assessments where there were no specific abuse or neglect allegations. As a result, the proportion of investigations that met our urgent protection classification has dropped from 28% in 1998 to 15% in 2008. [citations omitted]

the United States and Australia have introduced a differential response model of child protection services.<sup>1233</sup> This differential response seeks to better discriminate between cases where traditional protective services are needed, and cases where voluntary services are offered, usually with links to community-based partners and networks, but no substantiation or coercive intervention is required.<sup>1234</sup> While my recommendations would not necessarily institute into law a system of differential response as envisioned by contemporary child protection theory and practice as outlined above, I am pointing to the perceived need in child protection practice itself to differentiate and address the prevalence of these risk-based grounds of harm which signal chronic need, from the grounds of physical abuse and sexual abuse which signal acute danger. It is also worth noting, however, that in order for differential response to be effective in child protection practice, substantive services must be provided to families by the non-protective pathway in order to prevent a crisis situation which does lead to acute danger and the need for a protective intervention.

Including the need to provide material supports to the family right in the definition of risk of harm, or the grounds of emotional maltreatment, neglect and exposure to domestic violence in the Act would serve to focus court and agency resources on where coercive interventions are absolutely necessary. Agency and court resources would necessarily have to focus coercive interventions on non-risk-focused cases such as physical

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<sup>1233</sup> Kyte et al, *ibid*.

<sup>1234</sup> *Ibid* at 126:

In this system, the protective pathway is restricted to referrals where the child has been severely maltreated, or where there is imminent risk for further abuse. The protective pathway remains responsible for determining substantiation (i.e., CPS decision that a child situation merits ongoing CPS involvement) through an investigation of forensic evidence, whereas the “non-investigative” DR pathway is usually applied to cases of low to moderate risk. This response focuses on engaging the family in an assessment of family needs and strengths, in order to determine what is needed to ensure child safety and well-being. Rather than being merely child-focused, DR aims to identify what individual and environmental barriers facing the family may be contributing to the maltreatment risk.

and sexual harm, and on risk-based cases including emotional harm, neglect and exposure to domestic violence where there is strong evidence of adverse effects on child functioning. This does not mean advocating non-intervention in cases of risk of harm, emotional harm, neglect and exposure to domestic violence. To the contrary, in this thesis I have argued that these grounds of harm are tied to social and economic disadvantage. If we want to provide for the best interests of children from socio-economically marginalized families we need to address this disadvantage both normatively and materially. However, my recommendations do mean that intervention should only include a coercive intervention in the strongest of cases where child functioning is shown on evidence to be adversely affected. Carefully targeting a coercive intervention in this way would focus attention on the child's needs and at the same time render visible the structural risks to the child such as housing, food, health and income insecurity.

Not only have child protection scholars noted the need to institute a differential response to funnel non-acute cases of maltreatment out of the protective services stream, but researchers have indicated a need to focus more agency resources on addressing physical and sexual abuse of children. Data from the 2012 Community Health Survey – a nationally representative survey – indicated that 26% of adults reported experiencing physical abuse and 10% of adults reported experiencing sexual abuse.<sup>1235</sup> A study conducted in Ontario, however, found that only 5.1% of respondents with a history of physical abuse as children had contact with child protective services and only 8.7% of those with a history of child sexual abuse had contact with child protective services.<sup>1236</sup> While one is a national study and one is provincial, these results tell us generally that child

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<sup>1235</sup> See Tracie O Afifi et al, “Relationship Between Child Abuse Exposure and Reported Contact with Child Protection Organizations: Results from the Canadian Community Health Survey” (2015) 46 *Child Abuse & Neglect* 198 at 199.

<sup>1236</sup> *Ibid.*

protective services are not effectively addressing the bulk of physical and sexual abuse cases in Canada.<sup>1237</sup> A differential response that limits a coercive engagement with families on the basis of risk-based grounds of harm, would serve to focus the attention of courts and workers, and the money invested in litigating child protection cases, towards investigating and addressing these cases of physical and sexual abuse.

Furthermore, focusing agency and court resources on non-risk-focused cases such as physical and sexual harm, and on risk-based cases including emotional harm, neglect and exposure to domestic violence where there is strong evidence of adverse effects on child functioning, would ensure that there is a focus on the needs of the child, and on not removing the child from an environment where he or she may be functioning adequately. The agency should be held to its burden under the Act to bring evidence to prove how this substantial risk of harm, exposure to domestic violence, emotional harm or neglect is impairing a child's physical, emotional, or psychological functioning. Where the agency cannot bring evidence of how child functioning is substantially affected, the Agency should not be able to make out the grounds of harm or risk of harm at the 90-day protection hearing.

Without holding the state to these standards we have what we have today: the proliferation of a myriad of "risk-based" grounds of harm, the issuing of supervision orders, and the mounting of a professional case against the parent focused on parental deficit which not only keeps the parent and child under the surveillance and discipline of the system, but it creates a "case" against the parent which they cannot "win." In other words, there is little testing of the actual need for, or the benefits of, state intervention into these marginalized families. The way that these risk-based grounds are proven and acted upon in the system is self-fulfilling. It is not only the parent that loses when the most

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<sup>1237</sup> *Ibid.*



coercive of state interventions is facilitated, unchecked. This hollowing out of a presumption of family autonomy for families in poverty deprives children at the center of child protection law of the benefit of a child-focused system of child protection.

Integral to supporting a contextualized presumption of family autonomy at law, however, requires not only material support but strong legal protections. Families involved in the system today require the same things that they needed some 135 years ago. Families require not only material and normative support, but substantive access to justice<sup>1238</sup> and legal protections. As Wald and Mnookin argued some 40 years ago, a child-focused system, that is, a system focused on the needs of the individual child and not the abstract child, requires a rigorous testing of the need for and benefits of state intervention into the family relationship. In recognition of the need to scrutinize agency intervention into the family, the least intrusive intervention model of child protection instituted provisions in the CFSA which mandated that the agency prove objective harm or substantial risk of harm to the child,<sup>1239</sup> and saw the introduction of age-sensitive time-lines to respect the child's unique sense of time.<sup>1240</sup> Furthermore, the CFSA introduced measures to ensure that Act was implemented in a way that was consistent with the central principles of the Act and with

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<sup>1238</sup> In Nova Scotia, legal aid services are provided for families in child protection proceedings that meet the legal aid cut off as mandated by *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46. However, substantive access to justice may require going beyond the provision of legal advocates for the family. For example, success has been shown with the Center for Family Representation program in New York where parents are partnered not only with legal advocates but with a team of advocates such as a parent advocate, social worker and lawyer. Wendy Bach provides the following information on the groups' success:

While in 2012 the average stay in foster care in New York City was 6.8 months, the average stay for a child whose parents were represented by [the Center for Family Representation] was 2.5 months. Moreover, more than 50% of children in families represented by CFR never enter foster care at all. [citations omitted]

Wendy Bach, "Flourishing Rights" (2014-2015) 113 Mich LR 1061 at 1074.

<sup>1239</sup> Section 22.

<sup>1240</sup> Section 45.

the needs of children and families, including the creation of a Minister's Advisory Committee to oversee implementation of the Act.<sup>1241</sup>

While we introduced aspects of this system of “least intrusive intervention” with the CFSA in 1991, we have failed to hold the state to its obligations under the Act, as well as ensuring support for family autonomy through both material and normative support for the marginalized family. As a result, we have now come full circle. On April 30<sup>th</sup>, 2015 the Minister of Community Services introduced amendments to the *Children and Family Services Act* which would see the protections afforded to families and children in the CFSA largely scaled back.

### **Proposed Amendments to the CFSA**

On April 30<sup>th</sup>, 2015, the Minister of Community Services, Joanne Bernard introduced Bill 112, advancing the government's proposed amendments to the *Children and Family Services Act*.<sup>1242</sup> Among other changes, these amendments would see changes to the following: the grounds for finding a child to be in need of protective services,<sup>1243</sup> reporting requirements,<sup>1244</sup> investigative powers of social workers,<sup>1245</sup> the judge's ability to make certain interim orders,<sup>1246</sup> and time limits for making final disposition orders under

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<sup>1241</sup> Section 88.

<sup>1242</sup> Bill 112, *An Act to Amend Chapter 5 of the Acts of 1990, the Children and Family Services Act*, 2<sup>nd</sup> Sess, 62<sup>nd</sup> Gen Ass, Nova Scotia, 2015 (first reading 30 April 2015), online: Legislative Counsel <<http://nslegislature.ca/legc/>> [hereinafter, Bill 112].

<sup>1243</sup> Cls 1(d), cl 11.

<sup>1244</sup> Cls 12, 13.

<sup>1245</sup> Cl 3.

<sup>1246</sup> Cl 24.

the Act.<sup>1247</sup> Furthermore, the proposed amendments would see the removal of a judge's ability to make access orders after an order for permanent care and custody even if it is in the best interests of the child to do so.<sup>1248</sup> Finally, the amendments would see the elimination of the Minister's Advisory Committee which was initially set up pursuant to section 88 of the Act, to "review annually the provisions of this Act and the services relating thereto and to report annually to the Minister concerning the operation of the Act and whether the principles and purpose of the Act are being achieved." It is noteworthy that the Committee was meant to be representative of both parents and Agency and Ministry personnel, as well as representative of persons from "cultural, racial or linguistic minority communities".<sup>1249</sup>

Importantly, the proposed amendments would remove the requirement to connect the grounds of emotional harm, exposure to domestic violence and neglect to objective evidence of harm to the child. In introducing these amendments the Minister of Community Services explained this particular change as follows:

We can and will improve matters by intervening earlier and strengthening families. Ideally, children will be able to remain in their own families, safe, secure and loved. One of the keys to earlier intervention is to more clearly define what constitutes abuse and neglect. Chronic and serious neglect should be considered as part of child protection. Research has shown the effects of emotional and developmental harm have a long-lasting impact on young children.

Bob Parker is the chair of the Halifax Society for Children, Youth, and Families. He also chairs the overall provincial Coalition of Community Child Welfare Boards. These independent, volunteer-driven organizations are located across the province.

This coalition has called for the definition of neglect to be broadened. As Bob Parker explains, currently there must be clear evidence of physical harm to a child before intervention is possible. Right now, emotional abuse and developmental neglect are not sufficient for intervention even though they can be very harmful to

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<sup>1247</sup> Cl 31.

<sup>1248</sup> Cl 21(c).

<sup>1249</sup> CFSA, s 88.

a child. This amendment will enable us to support families earlier and stop situations from escalating.<sup>1250</sup>

For example, section 22(2)(f) of the Act currently requires that the Agency show that the child who has been harmed emotionally is suffering from any of a number of identifiable psychological effects:

(f) the child has suffered emotional harm, demonstrated by severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour and the child's parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm; [emphasis added]

The amendments, however, would remove the requirement to demonstrate that emotional harm has caused psychological harm to the child. The amendments would see the current 22(2)(f) removed and the following ground introduced:

(f) the child has suffered emotional harm, inflicted by a parent or guardian of the child or caused by the failure of a parent or guardian to supervise and protect the child adequately;<sup>1251</sup>

Furthermore, the proposed amendments would see the removal of the requirement of the agency to show that the parents failed to obtain services on a voluntary basis. This is

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<sup>1250</sup> Nova Scotia, House of Assembly, *Hansard*, 62<sup>nd</sup> Ass, 2<sup>nd</sup> Sess (7 May 2015) at 5155 (Hon Joanne Bernard). In his article, "Reforming Ontario's Child and Family Services Act: Is the Pendulum Swinging Back Too Far?" Nicholas Bala addresses the long-running complaint that the grounds of neglect and emotional harm in statutes based upon the "least intrusive intervention" model are too narrow and that they allow parents to abuse their children:

A central theme of criticism of the 1984 C.F.S.A has been that children have been endangered because the definition of "child in need of protection" is too narrow, and that the definition required agencies to leave children with parents who abused or even killed them. However, all of the child abuse deaths arose in cases that were within the present definitions of "substantial risk of physical harm." The problems arose because of difficulties that agency workers had with evidence gathering or (at least with hindsight) from the failure to exercise proper judgment. No definition of child in need of protection will eliminate the need for professional judgment and sometimes very difficult individualized decision-making.

Bala, "Pendulum Swinging Back Too Far?", *supra* note 947.

<sup>1251</sup> Bill 112, cl 11(a).

likewise inconsistent with the least intrusive intervention model of child protection services.

The proposed amendments would also see a new definition of “emotional harm” included in the definition section: “emotional harm’ means harm to a child's self-concept or self-worth or harm that seriously interferes with a child's healthy development, emotional functioning and attachment to others.”<sup>1252</sup> Disconnecting the grounds of intervention from evidence of harm to the child makes it difficult to test Agency evidence of emotional harm. Counter to the original intent of the least intrusive intervention model of child protection, this amendment effectively lowers the threshold for Agency intervention into the family and it fails to focus intervention on the harm to and subsequent needs of the child. The amendments make similar changes to the grounds of exposure to domestic violence and neglect; grounds which in this thesis I have shown are particularly vulnerable to negative evaluations of socio-economically marginalized mothers, and to extending a coercive intervention with families in poverty.

The proposed amendments would see the removal of the need for the agency to show that the child has suffered physical or emotional harm as a result of exposure to domestic violence. Furthermore, the proposed amendments would see the removal of the necessity to show repeated exposure to domestic violence, potentially contemplating a single incident. The current ground for intervention provides as follows:

22(2)(i) the child has suffered physical or emotional harm caused by being exposed to repeated domestic violence by or towards a parent or guardian of the child, and the child's parent or guardian fails or refuses to obtain services or treatment to remedy or alleviate the violence;

The amendments would see that ground of intervention read as follows:

(i) the child has been exposed, directly or indirectly, to violence in the home or involving a relative of the child, and the child's parent or guardian fails or refuses

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<sup>1252</sup> Cl 1(g).

to obtain services or treatment, or to take other measures, to remedy or alleviate the violence;<sup>1253</sup>

The ground would not require that the child be exposed “directly” but rather, the child could be exposed “indirectly”, as well, and the child could be found to be in need of protective services. The amendments proposed to this ground further expose a mother suffering domestic violence in the home to a coercive intervention on behalf of the agency. Even if a mother ensured that her child was not directly a witness to domestic violence in the home, nor was the child suffering any physical or emotional harm from the un-witnessed domestic violence, she could potentially see her child being declared a child in need of protective services. It is noteworthy that the proposed amendments do not contain any definition of what constitutes domestic violence. This amendment, could further threaten the safety of a mother who is a victim of domestic violence *as well as* her child by preventing her from seeking outside help to remedy the violence.

Finally, and potentially most disturbingly, the proposed amendments would see the requirement that the agency show a child has suffered physical harm caused by neglect removed from that ground of intervention. Currently, the ground for finding a child in need of protective services for neglect requires that:

22(2)(j) the child has suffered physical harm caused by chronic and serious neglect by a parent or guardian of the child, and the parent or guardian does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm;

22(2)(ja) there is a substantial risk that the child will suffer physical harm inflicted or caused as described in clause (j);

The proposed amendments would see these two grounds read as follows:

(j) the child is experiencing chronic and serious neglect by a parent or guardian of the child;<sup>1254</sup>

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<sup>1253</sup> Cl 11(a).

<sup>1254</sup> Cl 11(f).

(k) there is a substantial risk that the child will experience chronic and serious neglect by a parent or guardian of the child, and the parent or guardian does not provide, refuses or is unavailable or unable to consent to, or fails to co-operate with the provision of, services or treatment to remedy or alleviate the harm;<sup>1255</sup>

The amendments propose to include the following definition of neglect in the definition section of the Act:

- (p) "neglect" means the failure to provide
- (i) food, clothing, shelter or any necessary medical, surgical or other remedial intervention;
  - (ii) supervision necessary to ensure a child's health, safety and well-being;
  - or
  - (iii) a supportive, nurturing and encouraging environment necessary for a child's emotional development and well-being.<sup>1256</sup>

Removing the requirement for the agency to show physical harm to the child lowers the threshold for testing the necessity of agency intervention to such a degree that it threatens to potentially expose any family to agency intervention in which there is a child that is at risk for not receiving a “supportive, nurturing and encouraging environment”. It has now been well established that the ground of neglect is tied to socio-economic marginalization.<sup>1257</sup> Not only does the removal of the requirement of the agency to show harm to the child on the basis of neglect lower the threshold for intervention in families in poverty, but the tying of neglect to a child’s “emotional development and well-being” further exposes marginalized families to damaging value judgments.

The inclusion of factors predicated upon a testing of a child’s “emotional development and well-being” hands over a great deal of decision-making authority to assessors and therapists who will be called upon to give this evidence. Marginalized families who have to make difficult financial and time-management choices because of

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<sup>1255</sup> *Ibid.*

<sup>1256</sup> Cl 1(h).

<sup>1257</sup> See for example, Dee Wilson & William Horner, “Chronic Child Neglect: Needed Developments in Theory and Practice” (2005) 86 *Families in Society: J of Cont Soc Serv* 471; Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (New York: Basic Books, 2002).

constrained circumstances may find themselves charged with risking their children’s “emotional development and well-being”. Families in poverty who are at higher risk for experiencing mental health disorders may find themselves particularly disadvantaged by this ground of developmental neglect. As discussed, this will have a disproportionate impact on single-mother-headed and racialized families who comprise a relatively higher proportion of low income families in Nova Scotia.<sup>1258</sup>

While the Minister has hailed these amendments as supporting vulnerable children and families, the Government has not announced new funding for the Department of Community Services. Instead, the Minister announced that \$2 million would be given to non-profit community based agencies around the province.<sup>1259</sup> While this funding to family resource centers is important for low income families it does not address issues of income insecurity and housing insecurity faced by so many vulnerable families in Nova Scotia. The lack of additional funding to the Department is particularly troubling as the amendments expand reporting requirements<sup>1260</sup> and the grounds for intervention could potentially see a sharp increase in reported incidents of maltreatment, investigations, and children found in need of protective services. A lack of funding was raised in the Minister’s Advisory Committee as a consistent source of frustration for both families and social workers in the system.<sup>1261</sup>

Even prior to these proposed amendments coming into force there were reports of a sharp increase in referrals, investigations and cases of substantiated maltreatment from

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<sup>1258</sup> Vanier Institute, *supra* note 1070; Canada, National Council of Welfare, *Poverty Profile: Special Edition, A Snapshot of Racialized Poverty in Canada*, online: (30 January 2012).

<sup>1259</sup> Nova Scotia, House of Assembly, *Hansard*, 62<sup>nd</sup> Ass, 2<sup>nd</sup> Sess (7 May 2015) at 5148.

<sup>1260</sup> Bill 112, cls 12, 13.

<sup>1261</sup> Minister’s Advisory Committee 2008, *supra* note 53.



2012-2013 to 2014-2015. In 2012-2013 there were 9035 referrals, 6601 investigations and 1249 substantiated cases of maltreatment.<sup>1262</sup> In 2014-2015, however, these numbers rose sharply to 14,045 referrals, 9530 investigations and 3431 substantiated cases of maltreatment. This is a ~45% increase in referrals and investigations and a staggering 270% increase in cases of substantiated maltreatment. In 2014-2015 there were 1200 supervision orders issued and the Minister indicates that 114 children were brought into care that year. It is likely given the almost threefold increase in substantiated cases of maltreatment from the 2012-2013 year that this resulted in the sharp increase in the number of supervision orders in 2014-2015. However, there is no indication that the Department's budget is increased to meet this added demand and indeed, as stated, that Department saw a transfer out of over \$40 million in that same time period.<sup>1263</sup> Nor did the Government indicate how it would finance what is likely to be yet another increase in the demand for services should the proposed amendments be passed.

A lack of increased funding for the Department raises questions as to how services will be provided to more families sufficient to get them to the point where the Agency may terminate their intervention with the family. While the Minister indicates that rates of permanent care and custody in Nova Scotia are low at 5.6% of Court proceedings, this does not indicate the extent of potentially coercive intervention with families.<sup>1264</sup> While 114 children were ordered into the permanent care of the Agency in 2014-2015, 1200 children were the subject of supervision orders. This means that hundreds of families were under

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<sup>1262</sup> Nova Scotia, House of Assembly, *Hansard*, 62<sup>nd</sup> Ass, 2<sup>nd</sup> Sess (7 May 2015) at 5148 (Larry Harrison).

<sup>1263</sup> See Provincial Budgets for 2012-2013 to 2014-2015, online: Department of Finance <<http://www.novascotia.ca/finance/en/home/budget/budgetdocuments/default.aspx>>.

<sup>1264</sup> Nova Scotia, House of Assembly, *Hansard*, 62<sup>nd</sup> Ass, 2<sup>nd</sup> Sess (7 May 2015) at 5155 (Hon Joanne Bernard).

the scrutiny of the Agency, potentially against their will. As discussed in Chapter 5, it is more likely that a family in poverty will experience support through services such as housing and income maintenance and child care subsidy. On the other hand, services such as budgeting and parental advice extend a system of surveillance and monitoring of parental behaviour without providing much in the way of determinate outcomes.<sup>1265</sup> Without commitments to funding the services necessary to meet the increase in supervision orders that already occurred in 2014-2015, it is unclear what types of supportive services will be provided to families if these new definitions of harm to the child are accepted into law and more cases of maltreatment are investigated and substantiated.

Finally, a firm commitment to an increase in funding for services to families in the system is required given the changes that Bill 112 seeks to make to the terminal time lines under the Act. The proposed amendments would see section 45 of the Act repealed and the following terminal time lines substituted:

45 (1) The duration of a disposition order made pursuant to Section 42 must not exceed three months.

(2) Subject to Section 45A, the cumulative duration of all disposition orders made pursuant to Section 42 in respect of a proceeding must not exceed twelve months from the date when the initial disposition order is made.

(3) Where the parties are referred to restorative conferencing during a proceeding, the maximum cumulative duration of all disposition orders made pursuant to Section 42, as determined pursuant to subsection (2), must be reduced by the amount of time equal to that spent by the parties in restorative conferencing.

45A Where a child has been the subject of more than one proceeding and the cumulative duration of all disposition orders made pursuant to clause (c) or (d) of subsection (1) of Section 42 in respect of the proceedings exceeds eighteen months, the Court shall, in the child's best interests,

(a) dismiss the proceeding; or

(b) order that the child be placed in the permanent care and custody of the agency, in accordance with Section 47.<sup>1266</sup>

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<sup>1265</sup> See Wald, *supra* note 912; Wald, "Beyond CPS: Developing an Effective System for Helping Children in "Neglectful" Families: Policymakers Have Failed to Address the Neglect of Neglect" 41 Child Abuse & Neglect 49.

<sup>1266</sup> Bill 112, cl 31.

While the current time limits under the Act differentiate between the type of disposition order issued and the age of the child – ie., a shorter duration for younger children – the proposed amendments would impose a one-year time limit on disposition orders even for older children. Furthermore, the proposed amendments now introduce a cumulative time limit for all disposition orders for the child. This means that if a family has been involved with the Agency before and the child has been subject to a temporary care and custody order or under the supervision of the Agency in the care of a person other than the parent or guardian of the child, then on the second proceeding the total duration for the parents to remediate the situation will in all likelihood be less than one year. While on the one hand it can be argued that this will foster greater certainty for children as it prevents proceedings for going on too long, it also means that more children are likely to end up on the permanent care and custody of the Agency.

The stricter time limits will mean that parents will have less time to complete treatment programs, get into stable housing and employment situations, benefit from counselling and generally, remediate what in many cases are complex and interlocking personal, social and economic problems. While it can be argued that faster rates of permanency planning in terms of adoption and guardianships are good for younger children, the same cannot necessarily be said for older children. The initial time limits at section 45 of the CFSA recognized that children under 12 had a different sense of time than children over 12. For this reason, the time limits for disposition were extended to 18 months for children over the age of 12 who in all likelihood had a greater potential for having attached to a parent.<sup>1267</sup> Furthermore, while the potential of finding an adoptive home for a child under 4 is quite high in Nova Scotia, the same cannot be said for children

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<sup>1267</sup> Section 45(1)(b).

over that age. Rates of adoption of children over 5 are low and rates of adoption for children over the age of 11 in Nova Scotia are lower still.<sup>1268</sup> This means that with tighter time limits an older child will be less likely to be reunified with his or her family, while at the same time facing the real risk that they will not be permanently placed in an adoptive home. Combined with the dwindling numbers of foster families in Nova Scotia, it is hard to see how tighter time limits for older children will be in their best interests.<sup>1269</sup>

The expanding of the scope of intervention into the family while at the same time limiting the actual services and support that can be offered to the family is not consistent with a contextual view of family autonomy nor is it in the best interests of children from marginalized families and communities. Furthermore, the focus on “soft services” serves to reproduce the construction of marginalized families as risks to their children, thereby undermining a rigorous testing of the need for state intervention into the family. The proposed amendments, particularly those to the grounds for finding a child in need of protective services, relieve the agency of having to show that intervention will be in the best interests of children. By turning the focus of adjudication away from the actual quality of state intervention and towards parental fault, the proposed amendments further serve

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<sup>1268</sup> Nova Scotia, Department of Community Services, *An Introduction to Adoption and Foster Care Information Session*, “Children Coming into Permanent Care vs Children Placed for Adoption 2009-2012” (accessed October 2013) [on file with author]. For the years 2009-2012, the following is a breakdown of children who came into care (675) vs children placed for adoption (359) in Nova Scotia:

**0 to 4:** 258 children came into care vs 240 placed for adoption:  
**5 to 10 years:** 176 children came into care vs 81 placed for adoption  
**11 to 19 years:** 241 children came into care vs 38 placed for adoption.

<sup>1269</sup> Research in the US on the ASFA found that older children who were not reunified with their families ended up leaving foster care through emancipation more often after tighter time limits were imposed (ie. 7% in 1998 and 11% in 2011). While the proposed amendments would see services extended to children over 16, in the US these services were extended to 18 and even 21 years of age. And still after emancipation, research shows that these young adults had poor outcomes including “low educational attainment, low earnings, high rates of pregnancy, relatively high rates of homelessness, and so on”. See Clare Huntington, “The Child Welfare System and the Limits of Determinacy” (2014) 77 *Law & Cont Prob* 221 at 244.

to de-contextualize state intervention into socio-economically marginalized families and reinforce the constructions of marginalized persons, especially mothers, as “risky” and lacking “personal responsibility”. Rather than supporting a concept of family autonomy which provides protections for the best interests of the child at hand, the amendments serve to relieve the agency and the courts of the obligation to scrutinize and provide for the needs of the child and family as a whole.

On June 2, 2015, the Truth and Reconciliation Commission released its calls to action to begin reconciliation. “The 94 calls to action represent the first step toward redressing the legacy of Indian Residential Schools and advancing the process of reconciliation,” said the Honourable Murray Sinclair, chair of the Commission, in releasing the Calls to Action.<sup>1270</sup> The first at the 94 calls to action demand that federal, provincial, territorial and Aboriginal governments commit to reducing the number of Aboriginal children in care by monitoring and assessing neglect investigations, and by providing adequate resources to enable Aboriginal communities and child welfare organizations to keep Aboriginal families together where it is safe to do so.<sup>1271</sup> Greater scrutiny of state action into marginalized families is not just about “parent’s rights” – *their* rights to liberty and *their* rights to security of the person. Demanding more substantive support for families and – in many cases, such as First Nations and African Nova Scotian – communities, is above all, in the interests of the children from these families and communities.<sup>1272</sup>

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<sup>1270</sup> Truth and Reconciliation Commission of Canada, News Release, “TRC Releases Calls to Action to Begin Reconciliation” (2 June 2015), online: TRC <[http://www.trc.ca/websites/trcinstitution/File/TRCReportPressRelease%20\(1\).pdf](http://www.trc.ca/websites/trcinstitution/File/TRCReportPressRelease%20(1).pdf)>.

<sup>1271</sup> Truth and Reconciliation Commission of Canada, *Calls to Action*, *supra* note 1206 at (1) i. to iii.

<sup>1272</sup> *Restorative Inquiry*, *supra* note 133.

In many ways, the CFSA represented a culmination of what we have learned from the history of child protection law and jurisprudence. The Act is meant to be service focused, to respect the presumption of family autonomy and integrity, to do away with vague standards of harm which invite negative value judgments about parents, and instead to focus on the actual needs of the child. Rather than ensuring that we are living up to our commitments under the CFSA in the name of supporting family autonomy and securing the interests of children from marginalized families, we see the government introducing changes to the Act that would see the scaling back of the protections for socio-economically marginalized children and families. We see an undermining of protections for family autonomy in favour of agency evaluations of what constitutes a child's normal, "healthy development"<sup>1273</sup> and a "nurturing...environment".<sup>1274</sup> The scaling back of measures to scrutinize not only the beneficence, but the quality, of state care of the child<sup>1275</sup> while at the same time demanding a greater role for the state in determining what constitutes the normal child, is reminiscent of an era that has already proved itself to be inimical to the best interests of children marginalized by racism, poverty, sexism and ableism.

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<sup>1273</sup> Cl 1(1)(g).

<sup>1274</sup> Cl 1(1)(h)(iii).

<sup>1275</sup> Cls 24(1)(a); 31; 59(a); 33(1);

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